Supreme Court, U.S.
FILED
SEP 23 2009
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No. 09-411

In The

Supreme Court of the United States

Oscar L. Thomas, Pro Se

Petitioner,

v.

Eric K. Shinseki,
Secretary, United States Department of Veterans Affairs, et al

Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals for the
District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner Oscar L. Thomas, ("Thomas") is an U.S. Army Retired Senior Non-Commissioned Officer with 25 years of honorable military service, to include wartime service. Upon retirement from military service on July 31, 1989, Thomas, because of his service and the unseen wounds and scars of military service, filed claims for service-connected disability benefits with the Department of Veterans Affairs (VA).

In the processing and adjudication of his claims for those benefits, Thomas claimed that VA employees committed tortuous acts and omissions that caused him serious injury. When the VA failed or refused to properly re-adjudicate his veteran's benefit claims disputes, Thomas appeal his veteran's benefit claims disputes to the Board of Veterans Appeals (BVA) and the Veterans Court through the Veterans Judicial Review Act (VJRA), 38 U.S.C. § 511(a), and for his alleged common law tort claims based on acts and omissions of medical malpractice and other torts, filed civil suit in the United District Court for the District of Columbia. As explained in the Petition, these claims are now inextricably intertwined constituting a jurisdictional conflict that this Court is being asked to resolve.

1. Whether a District Court may exercise subject-matter jurisdiction over a case under the Federal Tort Claims Act (FTCA), 28 U.S.C. §1346(b), and its framework, §§ 2671-2680, when the U.S. Attorney General or his designee fails or refuses to issue "scope of employment certifications", required by 28 U.S.C. § 2679(d)(1), certifying that each employee named in a civil suit was acting within the scope of his/her office or employment, and where the United States was never substituted as a party defendant, depriving the district court of federal statutory subject-matter jurisdiction, "all jurisdiction"?

2. In the alternative, if the district court did exercise subject-matter jurisdiction:

(a) Whether the two-year statute of limitations for presenting a claim under the Federal Tort Claims Act, 28 U.S.C. 2401(b), begins to run and had expired under District of Columbia Law for a tort claim that accrues *only* "when a prospective plaintiff discovers both his injury and its cause", citing *Sexton v. United States*, 832 F.2d, 629, 633 (D.C. Cir. 1987), or when "a plaintiff is deemed to have discovered "his injury" when he "knew or reasonably should have known of it", citing *Richard v. Duke Univ.*, 480 F. Supp. 2d 222, 235 (D.D.C. 2007), "when in both instances, the plaintiff was totally unaware of its "cause".

(b) Whether the filing of an amended complaint retroactively provides a district court with subject-matter jurisdiction in a FTCA case where it lacked all such jurisdiction in the first instance and where, in spite of the absence of such subject-matter jurisdiction, the D.C. Circuit Court of Appeals had nonetheless, finally decided the case, but subsequently decided and ordered that an amended complaint could be filed, allegedly bring both the original and wholly new claims, "***did not***" sue any federal employees in their individual capacity" when it had attempted to do so; and because, "the amended complaint's reference to "et al.", was "not sufficient to name ["***all***"] of the other defendants from appellant's original complaint", pursuant to Federal Rules of Civil Procedure (Fed.R.Civ.P) Rule 10(a); and, (If the amended complaint was not sufficient to ["name "***all***" of the defendants from the original complaint"], how was it sufficient to name "***any***" of the defendants?); when there was already a lack of subject-matter jurisdiction ["all jurisdiction"] under the FTCA in the first instance?

3. Did the district court act improperly and without subject-matter jurisdiction, commit plain error of law and abused its discretion by allowing the United States, (who was never a proper party defendant in this case), on behalf the Secretary, VA, and after nearly 6 years of litigation of this case on the jurisdictional issue, to raise and insert a new defense to Petitioner's Original and First Amended Complaint, e.g., the defense (that Petitioner had failed to exhaust his administrative remedies within the 2-year Statute of Limitation (SOL) required under the FTCA framework provisions, 28 U.S.C. § 2401(b), (which for the reasons already stated above, did not and does not apply), and specifically, where the defense necessarily improperly and prejudicially injected into this "case in controversy" and "dispute", the question and issue as to whether the [D]efendant/[R]espondent, [Secretary, VA], by raising that new defense, also raised and injected into the case a ("questions of law [or] fact necessary to a decision by the Defendant-Secretary under a law that affects the provision of benefits to veterans, (here, veteran's benefits to Petitioner), which here, is his raising his own questions of law [or] fact necessary to his own decision, and his decision alone to make on all questions of law [or] fact necessary to a decision (his own decisions) that (may not be reviewed by any court of tribunal), all of which by their nature and context, also became inextricably intertwined with his own benefit decisions and the courts' decisions on [his raised question of law and fact], which specifically, is ("whether Petitioner did or did not exhaust his administrative remedies within two years, e.g., (on or by a certain date after "learning of the VA examiner's diagnosis of March 5, 1991 involving a veteran's - (the Petitioner's) - benefit claims"), constituting an unauthorized review of the Secretary's decisions involving Petitioner's "veteran's benefit claims, i.e., the answer and resolution of the newly raised question or questions of law or fact?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1, the following list identifies all of the parties appearing here and in the court below.

The Petitioner here and in the United States Court of Appeals for the District of Columbia is Oscar L. Thomas, Pro Se.

The Respondents here and in the United States Court of Appeals for the District of Columbia are:

1) Eric K. Shinseki, Secretary, Department of Veterans Affairs, Agency, Defendant/Respondent
2) G. J. White, Defendant/Respondent
3) M. Corbin, Defendant/Respondent
4) Douglas A. Wallin, Defendant/Respondent
5) A. Butler, J. Jensen, Defendant/Respondent
6) C. Faye Norred, Defendant/Respondent
7) Sandra Mize, Defendant/Respondent
8) Dr. G. Thomas Yungman, Defendant/Respondent
9) Lona (Shannon) Shipley, Defendant/Respondent
10) Lucille Dunlap, Defendant/Respondent
11) A. Vangordon, Defendant/Respondent
12) Thomas Wayburn, Defendant/Respondent
13) V. L. Knott, Defendant/Respondent
14) L. Harvey, Iris Hirst, Defendant/Respondent
15) John Doe I, II, and III, Defendant/Respondent; and
16) United States of America, Defendant.

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

* At some point in the litigation, Eric Ken Shinseki was substituted for his predecessor, Erick K. Peake, as Secretary, Department of Veterans Affairs, per Rule 43(c)(2) of the Federal Rules of Appellate Procedure.

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I. Review is warranted because:

A. The district court never acquired Article III Federal Statutory "Subject-Matter Jurisdiction" over Petitioner's FTCA case under provisions of the FTCA and its framework;

and because all of the district court's rulings, decisions and opinions grant dismissal and summary judgement to the Defendants/Respondents were improper, as not taken in accordance with District of Columbia, Federal law and Supreme Court Precedence, and are null and void. For this single and very important reason alone, the petition or writ of certiorari should be granted.....24

B. Review is warranted because, in granting motion to dismiss and for summary judgment, the lower court departed from the accepted standard of review set by this Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 68 USLW 4480, (U.S., Jun 12, 2000).....25

C. Review is warranted because the DC Circuit also lacking appellate jurisdiction to review and rule on the merits of this case, improperly sanctioned the district court's dismissal and summary judgment opinion on the issue, standard and application of law for claim accrual, exhaustion of administrative remedies, and expiration of statute of limitation under the FTCA. 28 U.S.C. § 2401(b) in this case.....25

D. Review is warranted because the *Per Curiam* Summary Action Order issued by the 3-Judge Panel of the DC Circuit conflicts with all discernable opinions of all other Circuit Courts, as well as its own discernable opinions that have ever addressed this same important matter or question(s), which is "whether, in this case, the district court had Article III Federal Statutory Subject-mater Jurisdiction to hear/review and/or to adjudicate this Case under the FTCA framework"; that constituted protrusion and unauthorized reviewed an inextricable intertwined veteran's benefit claims and FTCA claim that "The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to

veterans or the dependents or survivors of veterans." And, that "The decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise, and because the Order also conflicts affirmations contained in Opinions of this Court.....25

E. The district court's rulings, and the DC Circuit's affirmation, if allowed to stand and become precedence, will have a very chilling and damaging effect on every veteran's rights who may need and has to apply for veteran's disability benefits form the VA, and will constitute and sanction court-intervention, protrusion, intrusion and unauthorized reviewed of inextricable intertwined veteran's benefit claims decisions and FTCA claim at the request of the Secretary himself when "The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans." And, that "The decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise, and because the Order also conflicts affirmations contained in Opinions of this Court.....26

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The Summary Affirmance Order of the Appellate Court affirming the opinion of the district court whose review is sought is reproduced in the Appendix at A-1 - A-3 and unreported.

The Appellate Court's Order denying Request for Rehearing and Rehearing En Banc is reproduced in the Appendix at A-4, and is unreported.

The District Court's Memorandum Opinion of March 20, 2008, dismissing and granting summary judgment to Defendants/Respondents is reproduced at A-5 – A-29 and is unreported.

The Appellate Court's (initial) Memorandum Opinion, (Civil Action # 5182) in Petitioner's Initial Appeal of (Civil Action 02cv1743), reported as *Thomas v. Principi*, 394 F.3d 970, 974 (D.C. Cir. 2005 and reproduced in the Appendix at A-30 - A-40.

The District Court Initial Amended Memorandum Opinion of Dismissal date May 28, 2003, reported at 265 F. Supp. 2d at 41, and reproduced in the Appendix at A-51- A-67.

Department of Veterans Affairs, Regional Office, Washington, DC, Statement of the Case ("SOC"), Page 13 and date 09/29/99 is reproduced in the Appendix at A-67.1.

The District Court opinions are reproduced in the Appendix at A-16 and A-17, respectively.

JURISDICTION

Jurisdiction is proper in this Court. The judgment sought to be reviewed was entered by the U.S. District Court for the District of Columbia on March 20, 2008. Subsequently, on May 31, 2008, the trial judge denied a Motion for Reconsideration on June 17, 2008.

Jurisdiction of this Court is invoked under rule 10(c) which provides that review should be granted when the court below "has decided an important question of federal law which has not been, but should be settled by this Court..." Supreme Court Rule 10(c).

The District of Columbia Court of Appeals for the District of Columbia Circuit affirmed the district court judgment by Summary Affirmance Order entered on May 7, 2009. Petitioner Thomas timely filed a Petition for Rehearing and Rehearing En Banc, which was denied on July 16, 2009.

The present Petition for Writ of Certiorari is filed within 90 days of the denial of Petition for Panel Rehearing by the District of Columbia Circuit and is timely pursuant to 28 U.S.C. §§1257 and 2101(c) and Rule 10(1)(c) of the Rules for the U.S. Supreme Court.

The jurisdiction of this Court to review the Judgment of the DC Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

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STATEMENT OF THE CASE

Pro Se Petitioner, Oscar L. Thomas ("Thomas" or Petitioner), a United States Army Honorably Retired and Disabled Veteran, respectfully prays that a Writ of Certiorari be granted to review the decision of the United States (U.S.) District Court for the District of Columbia (DC District Court) granting Motion to Dismiss and for Summary Judgment of Petitioner's Complaint in favor of the Respondents under the FTCA and the affirmation of same by the United States Court of Appeals for the District of Columbia Circuit (DC Circuit).

A. Facts Giving Rise To This Case

This Petition arises from alleged claims of wrongful or negligence acts or omissions by the Secretary, Department of Veterans Affair and 15 other federal employees filed in a district court complaint under the Federal Tort Claims Act, 28 U.S.C.§§ 1346(b), dated August 30, 2002.

It presents a very unique set of unlikely and unusual legal imparities, facts, circumstances, and important questions of law, including veterans law questions warranting grant of Writ of Certiorari.[1]

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[1] This case involves the Secretary, VA who is the chief decider and final arbiter on all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors; who is also a defendant in a civil lawsuit involving claims, allegations and questions against him and his agency employees and a single veteran involving inextricably intertwined veteran's benefit claims and non-benefit tort claims, where he has to consider and decide a benefit decision claim and questions as to when the veteran first received his prior "Statement of the Case Decision" that will ultimately determine his decision as to if and when the veteran will receive certain veterans benefits; while at the same time, as to these questions, he has/is obartrarily and in his own self-

The fulcrum of this controversy is that it involves Article III of the U.S. Constitution and the intersection of at least three federal statutes:

1. The Federal Tort Claims Act (FTCA), 28 U.S.C.§§ 1346(b), 1402(b), 2401(b), 2671-2680, which allows the United States to be sued for certain torts committed by its employees. See id. § 1346(b)(1).

2. The Federal Employees' Liability Reform and Tort Compensation Act of 1988 (the "*Westfall Act*"), 28 U.S.C. § 2679, which amended the FTCA, immunizes federal employees who are sued for actions "within the scope of [their] office or employment" and substitutes the United States in their place. Id.§ 2679(d)(1). However, in order for substitution to occur, certain procedures must be followed, i.e.:

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interest, prejudicial, unfairly and without affording the veteran his statutory due process in accordance with the Veterans Judicial Review Act (VJRA) and the Veterans Claims Assistance Act (VCAA), advocating, urging and arguing before the lower courts and now this Honorably United States Supreme Court that [it] should, in essence, answer this/these question(s) and render the decision for him and to him that he himself has yet to answer or make, but for which he alone must answer and make while affording the veteran his due process rights as mandated by the VJRA and VCAA. 38 U.S.C. § 511(a) and the Veteran Claims Assistance Act (VCAA). Questions on decisions that he has yet to answer/make, but which already decided by these court decisions, whe he is now relying on and will continue to rely on to denying the veteran claims for veteran's benefits. Also, in this regard, there is also a conflict of interest and the Secretary owes the veteran a duty to have rendered his own independent decisions based on VA Rules, Regulations and Laws. Specifically, 38 U.S.C. § 511(a).

- The defendant must notify the Attorney General of the suit, have the Attorney General certify his actions as "within the scope of employment," and petition the court for such certification if the Attorney General refuses to do so. See id. §§ 2679(c),(d). Once the United States is substituted as the defendant, the suit only can proceed under the FTCA. See id. § 2679(b)(1).

3. The Veterans' Judicial Review Act (VJRA) of 1988, 38 U.S.C, § 511(a) and (b), which states:

> (a) The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans.
>
> (b) The decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

38 U.S.C.A. § 511(a) (1991).

(The full text of Article III and cited Federal Statutes at Pet's App. A-71 - A-102).

"When a federal employee is sued for a wrongful or negligent act (either in official or individual capacities), the Federal Employees Liability Reform and Tort Compensation Act of 1988 (commonly known as the Westfall Act) empowers the Attorney General to certify that the employee 'was acting

within the scope of his office or employment at the time of the incident out of which the claim arose.'" *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 419-420 (1995) (quoting 28 U.S.C. § 2679(d)(1)). After certification, the named defendant employee is dismissed from the action and the United States is substituted as the defendant; the case is then governed by the FTCA. Id.

Upon his retirement from the Army after twenty five years of honorable service, to include wartime service, Petitioner filed claims for service connected disability benefits under the VJRA with the Department of Veterans Affairs (VA), Washington, DC Regional Office ("VARO" or "RO"), Washington, DC, for service connected physical and mental disabilities sustained while in the Active Armed Forces of the United States. In connection with the processing and adjudication of Petitioner's benefit claims the VARO ordered Petitioner to undergo a VA Compensation and Pension Examination. The examination was conducted over the period March 5 - 6, 1991 at VA Medical Center (VAMC), Washington, DC.

As part of that examination, on a specific claim for an in-service diagnosed chronic anxiety neurosis disability, Petitioner was also directed to undergo a mental status examination. Upon completion of the examination Petitioner was released.

In a VARO Notification Letter addressed to Petitioner dated August 19, 1991, the VARO notified Petitioner of its rating decision but not the decision dated August 2, 1991. The Letter indicated denial of Petitioner's claim for an in-service diagnosed chronic anxiety neurosis on the bases that (1) the last psychiatric examination in service made no diagnosis of the veterans mental status, and (2) on the "VA exam" a final diagnosis was not made. Although required by VA Regulation to have provided Petitioner copy of the August 2, 1991 rating decision, it was concealed and withheld from petitioner by a VA doctor until January 2002.

The VJRA process provides provision for appealing VA's rating decisions, however, here the diagnosis was concealed and withheld and the process was denied Petitioner for nearly 11 years. During this period the veteran pursued his benefit claims by filing, without the benefit of his VA benefit claims file records containing the concealed and material medical information. Petitioner requested re-open of his claim for anxiety neurosis that by this time would have became final.

In the process of appealing denial for increases and to re-open claim for anxiety neurosis to the Board of Veterans Appeals, Petitioner received a VARO Statement of the Case ("SOC") dated September 29, 1999 on October 27, 1999, (see App. A-67.1), which was the initial basis for filing Standard Form (SF) 95 Administrative Tort Claim under the FTCA dated October 11, 2001 and the filing of suit on August 30, 2002.

The VA SOC falsely and fraudulently informed Petitioner that a "VA exam of August 2, 1991" had diagnosed Petitioner with a "working diagnosis" of "hallucinatory schizophrenia",[2] a medical diagnosis that, (unknowing to Petitioner), had apparently been concealed and intentionally withheld from Petitioner by the VA doctor and others who's name and identities were also concealed and withheld by VA and not yet known or discovered by Petitioner until later n January 2002.

While in the VJRA process and appealing the VA decision that had wrongfully denied Petitioner's claim for anxiety neurosis, and after the VARO refused to correct its apparent error concerning Petitioner's claim for "anxiety neurosis",

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[2] The Petitioner had not applied nor made any claim for a service connected disability benefit for "Hallucinatory Schizophrenia". And, has claimed and showed that no such VA exam of Petitioner had ever taken place on August 2, 1991, that Petitioner never underwent any such examination period, and therefore, was never diagnosed of any such schizophrenia on August 2, 1991 and therefore, could not have learned of, nor been informed of any "VA exam of August 2, 1991). The information was a fraud to conceal and to deny the veteran his veteran's benefit claim.

Petitioner, on a belief and the information then provided in the VA SOC and available, on a slight suspension that Petitioner was intentionally being injured in some manner, and after nearly two year of investigation and inquiry, with no success in obtaining relevant information on Petitioner's veteran's benefit claims, and after the VARO had promised Petitioner that it would correct the claimed errors, but after a reasonable period of time and had failed to do so, filed SF 95 Administrative Claim with the VA "Agency" on October 11, 2001; in spite of the prohibitions in 38 U.S.C. § 511(a) as to what was then clearly a veteran's benefit claim confined and restricted solely to the Secretary, VA's domain.

However, on November 10, 2001, because the VARO had failed to correct the error as promised and VA correspondence and verbal communication with VA indicated that the VA was intentionally misleading Petitioner about the matter, further suspecting possible injury, Petitioner filed an Amendment to the October 11, 2001 Administrative Claim as a continuing tort violation because VA correspondence had misled Petitioner that it was correcting the alleged error but was then indicating that it would not while continuing to conceal information, document and records. Petitioner reiterates: That at this time on October 11, 2001, Petitioner was not aware that VA doctor and others were still concealing and withhold from Petitioner the doctor's March 5, 1991 "working diagnosis of Hallucinatory Schizophrenia", and material medical information documenting the medical diagnosis, which was not released by Defendants/Respondents and finally discovered. Also, discovered at that time was Dr. Kelly's and the other Defendants/Respondents many intentional and continuous "false and fraudulence" causing "reliance" and the continuous fraud of the VA doctors' and the others' concealment(s), e.g., that:

> "The Petitioner had really never applied nor made any claim for a service connected disability benefit for "Hallucinatory Schizophrenia". That the concealed

> information and evidence showed that no such VA exam of Petitioner had ever taken place on August 2, 1991, that Petitioner never underwent any such examination on August 2, 1991, that Petitioner was never diagnosed of any such diagnosis on August 2, 1991, that the information was a fraud to deny the veteran his veteran's benefit claims and therefore, could not have learned of, nor been informed of any "VA exam of August 2, 1991) by Dr. Kelly and the other named Defendants/Respondents, as claimed by the VA and the United States, who never became a party-defendant."

These are the acts and omissions alleged and claimed in Plaintiff's/Petitioner's Original and Amended SF-95 Administrative Claims, Original and Amended Complaints for which Respondents are liable to Petitioner in Petitioner civil action. When, after 18 months the VA had failed to issue or make a grant of denial of Petitioner's administrative claims. Petitioner filed suit on August 30, 2002.

B. The District Court Proceedings

In the suit, among others, Petitioner alleged claims under the Federal Tort Claims Act ('FTCA"), 28 U.S.C. § 1346(b). In addition to these FTCA claims, the forty-four-page complaint also alleged Privacy Act/Freedom of Information (FOIA) violations, constitutional violations under *Biven*, and other common state law claims by the VA and several VA employees, for defamation, fraud, loss of consortium, and estoppel. The complaint named the Secretary, VA and 15 other named VA-employee-agents as Defendants. See D.C. Circuit Opinion of January 14, 2005 at p. 4, Pet.'s App. at A-33.

Shortly after Petitioner's filing of the civil action and after some 18 months later, Petitioner received a notice of denial from the Secretary, VA, essentially denying the claims based

on the defense that after review of file and material submitted, Defendants' found "no such negligent acts of omissions, denying the allegations and in essence, specifically saying that the VA had determined that the named employee-agents did not/had not committed the alleged acts and omissions while acting within the scope of their employment. See Department of Veterans Affairs Letter dated August 26, 2002 at Pet's App. at pp. A-68 - A-70.

"When a federal employee is sued for a wrongful or negligent act, the Federal Employees Liability Reform and Tort Compensation Act of 1988 (commonly known as the Westfall Act) empowers the Attorney General to certify that the employee 'was acting within the scope of her/his office or employment at the time of the incident out of which the claim arose.'" *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 419-420 (1995) (quoting 28 U.S.C. § 2679(d)(1)). After certification, the named defendant employee is dismissed from the action and the United States is substituted as the defendant; the case is then governed by the FTCA.

On January 27, 2003, United States Justice Department Attorney's filed an answer to the original complaint, and they either failed and/or refused to issue Westfall Act "certifications" certifying "scope of office or employment of the Secretary and the 15 employee-defendants named in the complaint, (whereas the United States Attorney General or his designee may issued such certification under the Westfall Act, 28 U.S.C. § 2679(d)(1), certifying, (in this case, that each of the named employees, as to the claims and complaint allegations alleged in the complaint against them), were acting within the scope of their office or employment).

This failure by the U.S. Attorney General or his designee was futile and means that the United States would not be and was never properly before the district court as a Defendant, and that the district courts was deprived of subject-matter jurisdiction over Petitioner's case under the Federal Tort Claims Act ("FTCA") and its framework provisions, 28 U.S.C. § 1346(b)-et seq., because the United States was never

substituted as a party-defendant in place of the named federal employee-defendants pursuant to the Westfall Act. 28 U.S.C. § 2679(d)(1). See *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 420 (1995). In *Lamagno*, this Court said, ("we held that the Attorney General's certification is "the first, but not the final word" on whether the federal officer is immune from suit and, correlatively, whether the United States is properly substituted as defendant"), 515 U. S., at 432. This clearly meant that the district court lacked FTCA subject-matter jurisdiction over the case in its entirety; that the action is not and cannot be "deemed an action against the United States . . . , and the United States "was never deem to be substituted as the party defendant" pursuant to 28 U.S.C. § 2679(d)(1) (emphasis added).

On March 28, 2003, the district court, without that subject-matter jurisdiction, without ("all jurisdiction") ("the United States was never substituted") on the argument of the improper party, erroneously pursuant Federal Rule of Civil Procedure (Fed.R.Civ.P.), Rules 12(b)(1) and (6) and clearly in violation of the Westfall Act Certification Process, federal statute, 28 U.S.C. § 2679(d)(1)[5], filed Motion to Dismiss Petitioner's original complaint, only originally raising the erroneous defense that all of Petitioner's claims were simply "veterans benefit claims" barred from review by the courts pursuant to 38 U.S.C. § 511(a), and not by any other raised affirmative defense to the complaint.[6]

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5 THE *WESTFALL* ACT CERTIFICATION PROCESS:
The *Westfall Act* authorizes the Attorney General to certify that a United States employee was acting within the scope of his employment at the time of an incident giving rise to a civil claim. *See* 28 U.S.C. § 2679(d)(1) and (2).

6 Review of a VA's determination in an individual benefit claim by a federal district court is precluded by 38 U.S.C. § 511 ("the decision of the Secretary as to any question [that affects the provision of benefits to veterans] shall be final and conclusive and may not be reviewed by any other official or by any court").

On May 1, 2003, in response to the "improper-defendant" motion to dismiss, Petitioner challenged that motion on grounds and issues, among others, that the U.S. Attorney General had failed or refused to issue "scope of employment certifications pursuant to 28 U.S.C. § 2679(d)(1), depriving the district court of Article III and 28 U.S.C. § 1331 subject-matter jurisdiction, of "all jurisdiction" under the FTCA, (because, again, the United States was never substituted as the defendant in place of the named employee-defendants, the district court's subject-matter jurisdiction was never [I]nvoked). 28 U.S.C. § 2679(d)(1). Petitioner also challenged that motion with his own opposition and cross-motion for summary judgment on that same date, and on May 2, 2003, Petitioner also filed a Motion to Amend the Complaint to add new defendants and to add other tort claims, (based on the continuing tort violation doctrine).

On May 28, 2003, the district court, finding pursuant to 38 U.S.C. § 511(a), that it "lacked subject-matter jurisdiction", but for other reasons, denied the motion to amend and dismissed all of Petitioner's claims and the entire original complaint based on its findings and determination that all of Petitioner's claims were not FTCA claims, but in fact, veteran's benefit claims, barred by § 511(a). Pet's App. at pp. A-41 - A-50.

Upon denial of a timely filed 06/02/2003 Motion for Reconsideration of that decision by the district court, Petitioner then timely filed an 07/15/2003 Notice of Appeal of the district court's decision to the United States Court of Appeals for the DC Circuit.

C. Apppellate Court Proceedings (Initial)

After a thorough brief of the raised jurisdictional issues to the Court, which did not include any defense by the Defendants/Respondents based on "expiration of the Statute of Limitation", any defense of "failure to exhaust administrative remedies", or based on any other defense that

could have been raised and adjudicated at that time, in a January 14, 2005 Memorandum Opinion, (Pet's App. at A-30 - A-40), the DC Circuit Appellate Court, seemingly not mindful of the district court's lack f subject-matter jurisdiction under the FTCA in the first instance, and that the United States had not been substituted and deprived of that jurisdiction by the United States itself, adjudicated Petitioner's appeal by affirming in part and reversing in part the decision of the district court. The Circuit Court ordered that the district court "***has jurisdiction***" to adjudicate some of Petitioner's tort claims for failure to inform, warn, treat or refer Petitioner for the diagnosis of "hallucinatory schizophrenia". The jurisdictional issue was settled. The appellate court then remanded the case with instructions to the district court to conduct further proceedings consistent with its opinion, i.e., (that the district court had subject-matter jurisdiction to adjudicate not barred by § 511(a) (emphasis added). See Pet's App. at A-40.[7]

However, because the district court, in fact, never had subject-matter jurisdiction over Petitioner's FTCA claims under the FTCA in the first instance and therefore, cannot be considered a "final Judgment" and therefore, depriving this Court of jurisdiction to adjudicative Petitioner's appeal on the merits, because the district court's initial decision and all decisions thereafter are all without any legal force or affect in

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[7] The DC Circuit Court of Appeals Opinion specifically Ordered that:

> "In light of our determination that the district court has jurisdiction over Thomas's FTCA claims, however, we will remand his request to add a claim against the VA for "failure to diagnose, inform, warn, or treat," 265 F. Supp. 2d at 40 n.5. Once Thomas amends his complaint, the district court, applying *Price* and this decision, will need to decide whether section 511 bars the additional allegation. We reverse the dismissal of counts III, V, and X, as well as the denial of Thomas's request to amend his complaint to add another tort claim, and remand for further proceedings consistent with this opinion."

law and the district court's decision is null and void - because the district court lacked Article III, 28 U.S.C § 1331 and § 2679(d)(1) statutory subject-matter jurisdiction, "all jurisdiction" over (to adjudicate) Petitioner's FTCA civil action under the FTCA framework provisions. 28 U.S.C. §§ 2671 through 2680.

This is true because it is only after the certification process has taken place, (that did not take place), that the action "shall be deemed an action against the United States [under the FTCA] and the United States shall be substituted as the party defendant." *United States v. Smith*, 499 U.S. 160, 164 n. 5 (1991) (brackets in original) (quoting 28 U.S.C. § 2679(d)(2)); *see also Haddon*, 68 F.3d at 1423; *Bancoult*, 370 F. Supp. 2d at 6.

It is only that [o]nce the United States is substituted, that the suit is to "proceed in the same manner as any action against the United States filed pursuant to section 1346(b) . . . and shall be subject to the limitations and exceptions applicable" to actions under the FTCA. 28 U.S.C. § 2679(d)(4); see also *Schneider*, 310 F. Supp. 2d at 264.

Because the *Westfall* Act provisions did not apply, the rule that the FTCA is the exclusive remedy for claims against the named federal employee-defendants for the alleged common law torts and other claims brought "for a violation of the Constitution of the United States;" or claims brought "for a violation of a statute of the United States", were, for the reasons already stated above, not subject to district court adjudication under the FTCA.

The U.S. Attorney, pursuant to the *Westfall Act*, 28 U.S.C. § 2679(d)(2) (1988) (the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub.L. No. 100-694, Sec. 6, 102 Stat. 4563, 4564-65 (1988)), and 28 C.F.R. Sec. 15.3 (1993), although authorized and may, never certified that the named employee-defendants had been acting within the scope of their office or employment when the incident allegedly took place. Again, see Department of Veterans Affairs Letter to Plaintiff/Petitioner at Pet's App. A-68 A-70. As a result of the

lack of his/her certifications, the United States was never substituted as party defendant and the district court lack jurisdiction.[8] *Osborn v. Haley*, 549 U.S. 225 (2007).

Therefore, all other claims alleged in the complaint against these named federal employees based upon their conduct undertaken within the scope of their office or federal employment, but which the improper-defendant government has explicitly denied, or otherwise, are *not* barred by the Act because, it simply did not and does not apply in this instance. The U.S. Attorney General simply never filed the certifications invoking the Act, indeed, he or she could not have issued any such certifications, because the agency had already stated in its, albeit late by at least 12 moths after its after-the-fact denial decision of August 26, 2002, that it had determined that none of the acts and omissions alleged in the Administrative Claim had been committed by any employee while acting within the scope of his or her employment. Thus, Petitioner's district court claims, FTCA claims or otherwise, did not fall, indeed could not have fallen within the purview of the *Westfall Act's* rule, provisions or framework and any possible absolute immunity for these federal employees - because the United States was never substituted as a party-defendant in their place and the district court's subject-matter jurisdiction was never invoked. Yet, although it lacked subject-matter jurisdiction, "all jurisdiction", in a memorandum opinion dated March 17, 2003, an opinion which is now clearly shown to have been null and void, erroneously dismissed Petitioner's district court complaint in its entirety for no other reason, other than what it found as being partially barred by the VJRA, 38 U.S.C. § 511(a).

However, Petitioner had timely and squarely raised this federal question (§ 2679(d)(2), 28 U.S.C.) issue before the district court in a response and cross-motion for partial summary judgment to the "improper

[8] Prerequisite for substitution under the *Westfall Act* is certification.

Defendants'/Respondents' motion to dismiss and for summary judgment on May 19, 3003", see Pet's App. at pp A-51-A-67, p. A-57, and has in every other pleading thereafter.

Petitioner assigns error to district court entire opinions and the DC Circuit's affirmation of those opinions. (Pet's App. at A-5–A-29 and A-41–50). The dismissals and the granting of summary judgment to the Defendants/Respondents as to all claims in Plaintiff/Petitioner's Original and Amended Complaints were clearly unlawful. The district court had improperly dismissed Petitioner's original district court and Amended complaints pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) in the first instance, and in the second instance, as for having "failed to exhaust administrative remedies" - because that Act and its provisions was never invoked and 28 U.S.C. § 2679(d)(1) and (2); 28 U.S.C. § 2401(b); and 38 U.S.C. § 511(a) did apply. (For the district court to act, it [m]ust have subject-matter jurisdiction).

Acting in response to the improper dismissal, false, erroneous, null and void rulings of the district court and partial reverse and remand of those rulings, on January 5, 2006, Pro Se Plaintiff/Petitioner, because he had no other option or remedy, filed an amended complaint in the district court re-alleging all claims not affirmed as dismissed and reversed by the appellate court and bringing another FTCA claim as authorized by the appellate court's opinion, alleging new claims against all original defendants and additional new then unknown John Doe defendants.

However, because within the case the DC Circuit Appellate Court had ruled and ordered in referenced to the Original Complaint, that:

> The district court's lack of jurisdiction over petitioner's Privacy Act and *Bivens* claims, as well as its denial of his motion for leave to amend," that "These arguments required little discussion." That,

"As to Thomas's Privacy Act claims, the district court had correctly found them barred by section 511." That, "Thomas's constitutional claims for money damages against VA employees were also barred." That, "Under *Bivens*, "special factors" may counsel "hesitation in the absence of affirmative action by Congress" establishing liability for the acts of individual government employees."" See *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 396 (1971)." "Special factors" included "an elaborate remedial system" constructed by Congress "with careful attention to conflicting policy considerations." *Bush v. Lucas*, 462 U.S. 367, 388 (1983)." That, "Here, "the administrative process created by Congress (the VJRA, 38 U.S.C. 511(a)), provides for a comprehensive review of veterans' benefits disputes." And that, "Further, Congress has explicitly precluded judicial review of veterans' benefits disputes, (see Petitioner's Argument at Footnote 1 above), which suggests that Congress' failure to create a remedy against individual VA employees was not an oversight." *Zuspann v. Brown*, 60 F.3d 1156, 1161 (5th Cir. 1995) (internal quotation marks omitted); accord *Sugrue v. Derwinski*, 26 F.3d 8, 12-13 (2d Cir. 1994). That, "Because we agree with the Fifth Circuit that this combination forecloses a *Bivens* action against VA employees for constitutional torts in the context of a dispute over veterans' benefits, we will affirm the district court's dismissal of these claims. And that, "Finally, reviewing for abuse of discretion, see *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (per curiam), we will also affirm the district court's denial of leave to amend the complaint to add a legal malpractice claim against Thomas's former legal representatives and another Privacy Act claim. *See* 265 F. Supp. 2d at 40 n.5. As the district court noted, Thomas "remains free to

> assert [these] claims in a new action against the appropriate defendants." *Id.* In light of our determination that [the district court ***has jurisdiction*** over Thomas's FTCA claims], however, we will remand his request to add a claim against the VA for "failure to diagnose, inform, warn, or treat," 265 F. Supp. 2d at 40 n.5. Once Thomas amends his complaint, the district court, applying *Price* and this decision, will need to decide whether section 511 bars the [a]dditional allegation."

In Section IV of the Opinion the DC Circuit Court said: We reverse the dismissal of counts III, V, and X, as well as the denial of Thomas's request to amend his complaint to add another tort claim, and remand for further proceedings consistent with this opinion. In all other respects, we affirm.

Even as a Pro Se litigant, Plaintiff/Petitioner knows and knew that the DC Circuit Court's January 14, 2005 Memorandum and Judgment, un-appealed by the Defendants/Respondents, meant that the subject-matter jurisdictional issues was settled as to Plaintiff/Petitioner's FTCA claims, (even if the lower court did in fact, have jurisdiction in the first instance) was resolved).

Because the FTCA 28 US.C. § 1346(b)(1) waives the United States sovereign immunity to be sued, the U.S. Attorney General or his/her designee never issued Westfall Act certifications certifying that each employee was acting within the scope of his or her office or employment, no named Defendant/Respondent have sought certification by the court on their own individual behalf, and named employee having even filed answer or other pleading, they are all in default and liable to Plaintiff/Petitioner on all claims and counts in the original and amend complaint.

D. District Court Proceedings on Reversal and Remand

On January 5, 2006, Plaintiff/Petitioner filed motion in the district court to filed an Amended Complaint. The district court granted the motion and the amended complaint was considered filed on March 1, 2006. In the Complaint Plaintiff/Petitioner named all of the original defendants and Respondents as ["*R. James Nicholson, et al*"] and as new defendants, ["John Does 1 - 4"].

On March 2006, Justice Department Attorney's filed answer to Plaintiff/Petitioner's amended complaint on behalf of the named defendants.

On March 1, 2006, the district court also issued order for a Proposed Scheduling Order with a Scheduling Conference scheduled for September 2006. Initial Scheduling Conference set for 5/3/2006

On September 3, 2006, Plaintiff/Petitioner moved in the district court and filed Renewed Motion for Partial Summary Judgment. The Defendants failed to response to the motion.

The Scheduling Conference was conducted on September 2006 via telephone conference hook-up with Plaintiff/Petitioner who resides in Germany.

The district Court said it would take Plaintiff/Petitioner's Renewed Motion for Partial Summary Judgment for review and consideration.

On September 27, 2006, the district court issued a scheduling order setting deadline for completion of discovery and for filing amended complaint, only by leave of the court.

On October 2006, without notice, reason or a Hearing, the Magistrate Judge struck Plaintiff/Petitioner's Renewed Motion for Partial Summary Judgment.

During discovery proceedings, a dispute arose, and without Plaintiff/Petitioner being able to conduct any effective or reasonable discovery, on motion by the defendants/ respondents, the district court granted defendants a motion for protective order, effectively foreclosing any chance for reasonable and needed discovery.

On November 2006, Plaintiff/Petitioner moved by motion to reopen and for a 60-day extension of time to conduct and

complete discovery, and for an extension of time at the end of that discovery to file motion for leave to file an amended complaint. The district court never responded to Plaintiff/Petitioner's motion requests while at the same time granting defendant/respondents motions for extensions of time (in access of 100 days) to filed out-of-time pleadings and responses to Plaintiff/Petitioner's motion requests and filings, to include responding to Plaintiff/Petitioner's Renewed and Second Renewed Motions for Partial Summary Judgment. The district court then allowed the United States, who had never became a defendant in the case, to file motions to dismiss and for summary judgment, contending that Plaintiff/Petitioner had failed to serve the John Does within the time allowed by Rule 4(m); and had failed to exhaust his administrative remedies within the 2-year statute of limitation period required under the FTCA framework provisions of 28 U.S.C. § 2401(b).

In response to the "improper United States Defendants' motions, among other assertions, Petitioner again raised the issue before the district court that the U.S. Attorney had failed or refused to issue "scope of office or employment certification for each named defendant to the complaint, that the United States was never substituted as a party defendant, that the district court lacked subject-matter Article III and statutory subject-matter jurisdiction, and that the district court had improperly adjudicated/reviewed Petitioner's case under the FTCA and review of veteran's benefit claims. The defendants,(the Secretary, VA) argued that it was not a "condition precedence" that the U.S. Attorney General was required to issued the certification(s) to invoke district court jurisdiction, and that this was only required when "a case had been filed in a state court." The district court agreed with defendants/respondents arguments. The district court explained Petitioner's claim of lack of subject-matter jurisdictional claims and allegations as ("this Court is puzzled by Mr. Thomas' argument"), and ("The Court assumes that Mr. Thomas means to argue that the Court does have

jurisdiction over his claims"). To further sustain their erroneous defense argument that "scope of office or employment certifications were not required to be issued by U.S. Attorney or his designee to invoke the district court subject-matter jurisdiction", Defendants/Respondents, relying on Rule 10(a), raised an additional new erroneous argument "that Plaintiff/Petitioner, in the filing of his first amended complaint, had "dropped" all of the originally named defendants named in the original complaint from the amended complaint", and "had not sued any of them in the amended complaint in their "individual capacities." That "Plaintiff/Petitioner's use of [et al.] was "insufficient to named all of the defendants from appellant's original complaint." However, even if the use of [et al.] was "insufficient" to name [a]ny of the defendants from the appellant's original complaint, it was sufficient to name them all, and but for a mute pleading error, even if can be considered that, it would have spelled out their names and named them all in the caption other than ("R. James Nicholson, Secretary, Department of Veterans Affairs, ["et al.]). Plaintiff/Petitioner had also requested to file a second amended complaint; whereas, Fed.R.Civ.P., Rule 15(a) commands that "motion to amend should be given freely". The district court committed error and abuse any discretion it may had, which it did not, when it did not allow a correction of the caption of the complaint in that instance. And, if it could even be considered that Plaintiff/Petitioner "had not sued "any of them in the amended complaint in their "individual capacities"", which it cannot, the *Westfall* commanded that:

> "When a federal employee is sued for a wrongful or negligent act, the Federal Employees Liability Reform and Tort Compensation Act of 1988 (commonly known as the *Westfall Act*) empowers the Attorney General to certify that the employee 'was acting within the scope of his office or employment at the time of the

incident out of which the claim arose.'" *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 419-420 (1995) (quoting 28 U.S.C. § 2679(d)(1))."

The Defendants/Respondents named in the amended complaint were all "federal employees", to include, [R. James Nicholson, Secretary, Department of Veterans Affairs, [et al.]. 28 U.S.C. § 2679(b)(1). (for "[s]ection 2679(b)(1) applies without exception to [a]ny [mployee of the Government"). See *Sullivan v. United States*, 21 F3d 198, 201 n. 6 (7th Cir.), cert. denied, – U.S. —, 115 S.Ct. 670, 130 L.Ed.2d 604 (1994). *Sullivan*, 21 F.3d at 202. See also 28 U.S.C. Sec. 2671.

Also, here and observing the aforementioned arguments concerning lack subject-matter jurisdiction, etc., the Defendants/Respondents' were nevertheless, allowed by the district court after nearly 6 years of litigation to raise and insert the new defense that Petitioner had failed to exhaust his administrative remedies within the 2-year Statute of Limitation (SOL) required under the FTCA framework provisions, 28 U.S.C. § 2401(b), (which for the reasons already stated above, does not apply). However, the defense, necessarily injected into this "case in controversy" and "dispute" the question and issue as to whether the Defendant/Respondent, Secretary, VA, by raising what becomes "a veteran's benefit question of fact and law" and his "answer/decision to this question/issue into this case. (A raised "questions of law [or] fact necessary to a decision by the Defendant-Secretary under a law that affects the provision of benefits, (here, veterans benefit to Petitioner), which here, is his own questions of law [or] fact necessary to his own decision, and his decision alone - on questions of law [or] fact necessary to a decision and questions that (may not be reviewed by any court of tribunal) that are now inextricably intertwined with his decisions and this court's review of his decisions involving Petitioner's "veteran's benefit claims, i.e., the question of (whether Petitioner did or did not exhaust his administrative within the 2-year after

learning of "the VA examiner's diagnosis of March 5, 1991 involving a veteran's - (the Petitioner's) - benefit claims, and where, necessary to the question, Petitioner had amended and/or filed no less than three additional SF-95 Administrative Tort Claims with the Secretary Defendant/Respondent that were (based on the same "continuing tort violations, theory and conduct, based on the newly discovered facts and information that was initially and still was being fraudulent concealed by the Defendants/Respondents. Facts and information then subsequently released by the Defendants/Respondents months and years later), which was well within the limitation period that clearly establishes that the SOL could not have begun to run until January 2002, when the Petitioner first learned of his "injury" (the concealment of the March 5, 1991 diagnosis and failures to inform, warn, treat or refer for other diagnosis by VA Doctor A. R. Kelly and other before unnamed and unidentified tortferiors, and its "cause", (federal employee, Dr. A. R. Kelly's name, and his identity, and the named/identity of other federal employees, (the "personal identity" of the tortfeasors)[7]. The district court's findings that: "Thus, Mr. Thomas acknowledged receiving on October 9, 1999, the VA's SOC indicating a "working

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[7] The Defendants/Respondents contentions and the court's conclusions that Plaintiff/Petitioner first learned of his injury and its cause on October 9, 1999, was factually erroneous and legally impossible because the VA examination and diagnosis described in the "VA SOC" for which they rely on, [n]ever [t]ook [p]lace and was factually incorrect and impossible; [the examination was never conducted and never existed]. The examination and diagnosis, which a number Plaintiff/Petitioner's claims grew out of, was the occurrences of March 5, 1991, and the concealment from Petitioner of all knowledge, material medical information and medical reports of the March 5, 1991 diagnosis, and VA rating decision of August 2, 1991 (the injury), (not the defendants-alleged diagnosis of "VA Exam of August 2, 1991 stated in the "SOC""), that, even if true, provided no identity of the VA examiner, (the tortferior), Dr. A. R. Kelly and others, (its cause).

diagnosis" of schizophrenia", aside form being totally false and fraudulent, provided Plaintiff/Petitioner with absolute no knowledge, information and/or medical report of the concealment of the concealment(s) by Dr. Kelly's and others of his March 5, 1991 diagnosis; his and others concealment of his examination report/material medical information, (the injury) and his and their names and identities, (who, it turned out to be, were all VA employees), (its cause)." Here, in its analysis of the facts and evidence and application of law, the district court misapplied the controlling law precedence, that "the two-year statute of limitations for presenting a claim under the Federal Tort Claims Act, 28 U.S.C. 2401(b), begins to run in the District of Columbia for a tort claim accrues *only* "when a prospective plaintiff discovers both his injury and its cause). *Sexton v. United States*, 832 F.2d, 629, 633 (D.C. Cir. 1987), but erroneously when "a plaintiff is deemed to have discovered "his injury" when he "knew or reasonably should have known of it", citing *Richard v. Duke Univ.*, 480 F. Supp. 2d 222, 235 (D.D.C. 2007); or when, citing no precedence, "he had enough information from the "SOC" to have known of his alleged injury", (but not its cause), or when he "had enough information from the "SOC" to seek money damages in October 2001"..... "when the plaintiff was totally unaware of its "cause", and had no knowledge that the information in the SOC at the time of filing of the claim was completely false and fraudulent, rendering it totally and completely nonexistent, and that the correct facts, information and documents were being concealed by the Defendants/Respondents. See *Sexton v. United States*, 832 F.2d, 629, 633 (D.C. Cir. 1987), ("a plaintiff is deemed to have discovered "his injury" when he "knew or reasonably should have known of it"). *Richard v. Duke Univ.*, 480 F. Supp. 2d 222, 235 (D.D.C. 2007).

Therefore, none district court's other related findings and rulings substantiates its legal facts and conclusion of law for dismissing and granting summary judgment to the "Non-Defendant" United States. In the alternative, even if the district court had subject-matter jurisdiction, the district

court incorrectly applied the relevant claim accrual rules and standard of review to hold that petitioners' claims accrued by October 9, 1999.

E. Appellate Court Proceeding (Second Appeal)

In a two-page unpublished Summary Action Order dated May 7, 2009, (Pet's App. at A-1 - A-3), the DC Circuit Court Panel of Honorable Judges *Garland*, *Griffith*, and *Kavanaugh*, Circuit Judges, by summary affirmance, affirmed the district court's memorandum opinion of March 20, 2008 dismissing and granting summary judgment to the Defendants/Respondents as to Plaintiff/Petitioner's entire complaint in favor of the "improper defendant" the United States, who was not even and never was a proper party-defendant to the original or first amended complaint.

The DC Court of Appeals erred, (see Summary Order at Pet's App. A-1), when it summarily affirmed the district's opinion at Pet's App. at A-5 - A-29.

Because the district never had subject-matter jurisdiction in the first instance, does not have subject matter jurisdiction over complaints and questions presenting challenges to, or involves "questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans, (38 U.S.C. § 511(a)), where such challenges, as here, required review of a Secretary's benefit decision in this case based on the question raised by the new Defendants/Respondents whole new defense. (The district court does not have jurisdiction over those elements of such complaints that are inextricably intertwined with the state court's decision). (Claims are inextricably intertwined if the district court must scrutinize (review) not only the challenged rule (VA Secretary decision) itself, but the state court's application of the rule). *Worldwide Church of God, 805 F.2d at 892.*

For these same reasons the DC Circuit's also lacked jurisdiction to adjudicate this case on the raised claim or defense by the Defendants/Respondents of "failure to exhaust administrative remedies" and/or "expiration of the "SOL", because the alleged and disputed accrual date of the FTCA is the same date as a claimed effective date for the grant or denial of [p]ending veteran's benefit [c]laims to be decided by the Defendant-Secretary, VA.

The record also clearly establishes that Petitioner had from the outset and throughout this litigation alleged silent and continuous fraudulent concealment on the part of Defendant/Respondents since March 5, 1991 through January 2002, clearly constituting "some extraordinary circumstances that, in the alternative, had Petitioner not timely file his claims, would have prevented Petitioner from timely doing so.

Within 45 days of the appellate court's order affirming the district court's March 20, 2008 decision, Petitioner posited a Petition for Rehearing and Rehearing En Banc with the DC Circuit Court.

On August 18, 2009, the DC Circuit denied Petition for Rehearing and Rehearing En Banc, (Pet's App. at A-4) prompting Petitioner's filing of this Petition for Writ of Certiorari.

REASONS WHY CERTIORARI SHOULD BE GRANTED

MAY IT PLEASE THE COURT:

I. Review is warranted because:

A. The district court never acquired Article III Federal Statutory "Subject-Matter Jurisdiction" over Petitioner's FTCA case under provisions of the FTCA's and its framework; rendering [a]ll of the district court's rulings, decisions and opinions below improper, as not taken in accordance with District of Columbia, Federal law and Supreme Court Precedence, and are all null and void. For

this single and very important reason alone, the petition or writ of certiorari should be granted.

B. Review is warranted because, in granting motion to dismiss and for summary judgment, the lower court departed from the accepted standard of review set by this Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 68 USLW 4480, (U.S., Jun 12, 2000).

C. Review is warranted because the DC Circuit also lacking appellate jurisdiction to review and rule on the merits of this case, and improperly sanctioned the district court's dismissal and summary judgment opinion on the issue, standard and application of law for claim accrual, exhaustion of administrative remedies, and expiration of statute of limitation under the FTCA. 28 U.S.C. § 2401(b) in this case.

D. Review is warranted because the *Per Curiam* Summary Action Order issued by the 3-Judge Panel of the DC Circuit conflicts with all discernable opinions of all other Circuit Courts, as well as its own discernable opinions that have ever addressed this same important matter or question(s), which is "whether, in this case, the district court had Article III Federal Statutory Subject-mater Jurisdiction to hear/review and/or to adjudicate this Case under the FTCA framework"; that constituted protrusion and unauthorized reviewed an inextricable intertwined veteran's benefit claims and FTCA claim that "The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans." And, that "The decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise, and because the Order also conflicts affirmations contained in Opinions of this Court.

E. The district court's rulings, and the DC Circuit's affirmation, if allowed to stand and become precedence, will have a very chilling and damaging effect on every veteran's rights who may need and has to apply for veteran's disability benefits form the VA, and will constitute and sanction court-intervention, protrusion, intrusion and unauthorized reviewed of inextricable intertwined veteran's benefit claims decisions and FTCA claim at the request of the Secretary himself when "The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans." However, the courts have made that decision for him and this was improper.

II. Jurisdiction and Legal Standards

A. Motion to Dismiss for Lack of Jurisdiction

Federal courts are courts of limited jurisdiction and the law presumes that "a cause lies outside this limited jurisdiction."[8] *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Because subject matter jurisdiction is an Article III as well as a statutory requirement, "no action of the parties can confer subject[]matter jurisdiction upon a federal court.'" *Akinseye v. District of Columbia*, 339 F.3d 970, 971 (D.C. Cir. 2003).

On a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), the plaintiff bears the

---

[8] The District Court exercises jurisdiction under 28 U.S.C. § 1331 and under the FTCA, 1346(b), however, the District Court's order dismissing Plaintiff's/Petitioner's FTCA claims that are inextricably intertwined with veteran's benefit claims pending under 38 U.S.C. it should not be consider a final decision for purposes of 28 U.S.C. § 1291.

burden of establishing that the court has subject matter jurisdiction. *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999); *see also McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 182-83 (1936).

Because subject matter jurisdiction focuses on the court's power to hear the claim, however, the court must give the plaintiff's factual allegations closer scrutiny when resolving a Rule 12(b)(1) motion than would be required for a Rule 12(b)(6) motion for failure to state a claim. *Macharia v. United States*, 334 F.3d 61, 64, 69 (D.C. Cir. 2003). Moreover, the court is not limited to the allegations contained in the complaint. *Hohri v. United States*, 782 F.2d 227, 241 (D.C. Cir. 1986), *vacated on other grounds*, 482 U.S. 64 (1987). Instead, to determine whether it has jurisdiction over the claim, the court may consider materials outside the pleadings. *Herbert v. Nat'l Acad. of Scis.*, 974 F.2d 192, 197 (D.C. Cir. 1992).

Here, the legal standard applied was simply inapplicable. First, because the U.S. Attorney General failed to issue *Certifications*, certifying "scope of office or employment" as to each employee. Second, United States was never substituted as party defendant in this case, and thus the district court subject-matter jurisdiction was never invoked (28 U.S.C. § 2679(d)(1), depriving the district court of "all federal jurisdiction" and from ever reaching the merit of the case and claims under the FTCA framework.

The district court's dismissal and summary judgment memorandum opinion, and the DC Circuit Court Summary Affirmance Action Order, affirming that opinion, both conflicts with the cited legal standard and legal authorities cited by Defendants/Respondents in Paragraph II A. *Kokkonen v. Guardian_Life. Co. of Am.*, 511 U.S. 375, 377 (1994), (Federal Courts are courts of limited jurisdiction and the law presumes that "a cause lies outside this limited jurisdiction."). *Akinseye v. District of Columbia*, 339 F.3d 970, 971 (D.C. Cir. 2003), (Because subject-matter jurisdiction is an Article III as well as a statutory requirement, "no action

of the [p]arties can confer subject[]matter jurisdiction upon a federal court."). Here, it was only pursuant to Federal Statute 28 U.S.C. § 2679(d)(1), that the district Court's subject-matter jurisdiction [m]ay be invoked). Since it was never invoked by U.S. Attorney General's Certifications, the district court never acquired subject-matter jurisdiction.

This being the case, the district court's memorandum opinion of March 20, 2008 granting dismissal and summary judgment, and the DC Circuit's affirmance should all be considered null and void and reversed. 28 U.S.C. § 2679(d)(1). See *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 420 (1995). (In *Lamagno*, this Court said, "we held that the Attorney General's certification is "the first, but not the final word" on whether the federal officer is immune from suit and, correlatively, whether the United States is properly substituted as defendant", 515 U. S., at 432).

B. **Summary Judgment**

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment must be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Diamond v. Atwood*, 43 F.3d 1538, 1540 (D.C. Cir. 1995). Moreover, summary judgment is properly granted against a party that "after adequate time for discovery and upon motion . . . fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. To determine which facts are "material," a court must look to the substantive law on which each claim rests. *Anderson*, 477 U.S. at 248 (1986). A "genuine issue" is one whose resolution could establish an

element of a claim or defense and, therefore, affect the outcome of the action. *Celotex*, 477 U.S.
at 322; *Anderson*, 477 U.S. at 248.

In ruling on a motion for summary judgment, the court must draw all justifiable inferences in the nonmoving party's favor and accept the nonmoving party's evidence as true. *Anderson*, 477 U.S. at 255. A nonmoving party, however, must establish more than "the mere existence of a scintilla of evidence" in support of its position. *Id.* at 252. To prevail on a motion for summary judgment, the moving party must show that the nonmoving party "fail[ed] to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. By pointing to the absence of evidence proffered by the nonmoving party, a moving party may succeed on summary ijudgment. *Id.* In addition, the nonmoving party may not rely solely on allegations or conclusory statements. *Greene v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999); *Harding v. Gray*, 9 F.3d 150, 154 (D.C. Cir. 1993). Rather, the nonmoving party must present specific facts that would enable a reasonable jury to find in its favor. *Greene*, 164 F.3d at 675. If the evidence "is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (citations omitted).

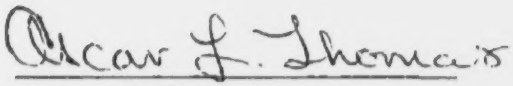
Here, as above, Plaintiff/Petitioner agrees with the stated legal standard that would normally be applied, however, for the same reasons stated above, it was simply inapplicable to this case.

Conclusion

For the cited important national interest reasons, the needs to guard and preserve of veterans' statutory rights and benefits, resolved important question of federal law, which

has not been, but should be settled by this Court the petition for writ of certiorari should be granted.

Respectfully Submitted,



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Supreme Court, U.S.
FILED

No. 09-411 SEP 23 2009

OFFICE OF THE CLERK
In The William K. Suter, Clerk

Supreme Court of the United States

Oscar L. Thomas, Pro Se

Petitioner,

v.

Eric K. Shinseki,
Secretary, United States Department of Veterans Affairs, et al

Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals for the
District of Columbia Circuit

APPENDIX A TO
PETITION FOR WRIT OF CERTIORARI

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APPENDIX TO WRIT OF CERTIORARI

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United States Court of Appeals
For the District of Columbia Curcuit

No. 08-5349 September Term 2008
10:-cv-01743-RMC

Filed on: May 7, 2009

Oscar L. Thomas,
Appellant

v.

Eric K. Shinseki, Secretary, Department of Veterans Affairs, et al.,
Appellees

BEFORE: Garland, Griffith, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of the motion to appoint counsel or amicus curiae; the motion for summary affirmance, the opposition thereto and motion for summary reversal, the response and reply in support of summary affirmance, and the reply in support of summary reversal, which contains a request for judicial notice, it is

ORDERED that the motion for appointment of counsel or amicus curiae be denied. With the exception of defendants appealing or defending in criminal cases, appellants are not entitled to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits. It is

FURTHER ORDERED that the motion for summary affirmance be granted and the motion for summary reversal be denied. The merits of the parties' positions are so clear as to warrant summary action See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987)(per curiam). The district count properly reviewed this case under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346, because appellant's amended complaint did not sue any federal employee in their individual capacities. The amendment complaint's reference to 'et al." was not sufficient to name all of the defendants from appellant's original complaint. See Fed. R. Civ. P. 10(a).

The district court properly concluded that the majority of appellant's FTCA claims were either time-barred or not properly presented to the agency. See Simpkins v. United States, 866 f.2d 483, 499 (D.C. Cir. 1989). The doctrine of equitable estoppel is not applicable to appellant case, because he presented no evidence that some extraordinary circumstances prevented him from filing his claims before the statue of limitation had run out. See Pace v. DiGuglielmo, 544 U.S. 408, 418 (2008).

With respect to the only claim appellant properly exhausted, the district court correctly determined tha the failed to present expert testimony, as required by Tennessee law, see Tarpeh-Doe v. U.S., 28 F.3d. 120, 123 (D.C. Cir. 1994), to establish the proper standard of care and demonstrate that appellee's action fell below that standard. See Norris v. East Tn. Children's Hosp., 195 S.W. 3d 78, 6-87 (Tenn. Ct. App. 2005). Aside from being improperly raised, see Singleton v. Wulf, 428 U.S. 106, 120 (1976) ("It is the general rule...that a federal appellate court does not consider an issue passed upon below."), appellant's contention that under the doctrine of res ipsa loquitur and

common knowledge is claims do not require expert testimony fails because even if these doctrines were applicable, expert testimony would still be necessary to prove that he alleged medical malpractice on the part of the appellee was the proximate cause of appellant's injury. See Meek v. HealthSouth Rehab. Ctr., 2006 WL 2106001, at *3 (Tenn. Ct. App. July 28, 2006).

Finally, the district court did not abuse its discretion when it dismissed the John Does from appellant's complaint, because appellant did not serve the summons upon the individual designated as "John Doe" within the appropriate time frame. See Fed. R. 4(m). Nor has appellant shown that the suffered any prejudice from the various other rulings of the district court that he challenges on appeal. See United States v. Microsoft Corp., 253 F.3d 34, 100 (D.C. Cir. 2001)(circuit court will not disturb district court's management of its docket "except upon the clearest showing that the procedures have resulted in actual and substantial prejudice to the complaint"). It is

FURTHER ORDERED that appellant's request for judicial notice be denied. See Fed. R. Evid. 201(b).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App.P. 41(b); D.C. Cir. Rule 41.

Per Curia

FOR THE COURT
Mark J. Langer, Clerk
By: Jennifer M. Clark
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5349 September Term 2008
1:02-cv-01743-RMC Filed On: July 16, 2009

Oscar L. Thomas,
Appellant

v.

Eric K. Shinseki, Secretary, Department of Veterans Affairs, et al.,
Appellees

BEFORE: Sentelle, Chief Judge, and Ginsburg, Henderson, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of the petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OSCAR THOMAS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No.**
	)	**02-1743 (RMC)**
	)	
R. JAMES NICHOLSON,	)	
Secretary, Department of	)	
Veterans Affairs,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OPINION

Plaintiff Oscar Thomas is a retired Army veteran who has, with mixed success, repeatedly sought benefit payments from the Department of Veterans Affairs ("VA") for physical and mental health conditions that he believes are connected to his military service. In this case, brought *pro se*, he sues R. James Nicholson, Secretary of VA,[1] raising malpractice and other tort claims based on a medical examination conducted

[1] Mr. Nicholson, sued in his official capacity, was substituted for his predecessor, Anthony J. Principi, the former Secretary of the Department of Veterans Affairs, pursuant to Federal Rule of Civil Procedure 25(d)(1). While the original Complaint [Dkt. #1] named Mr. Principi, the First Amended Complaint [Dkt. #51] names Mr. Nicholson. Because Mr. Nicholson was sued in his official capacity, the United States is the appropriate defendant and proceeds here accordingly. Mr. Thomas's argument that the United States is not a proper defendant because the Attorney General failed to file a scope-of-employment certificate is without merit.

by a VA doctor in 1991 and his visits to the VA Medical Center in Memphis, Tennessee. The VA moves to dismiss, and to the extent any claim survives dismissal, the VA seeks summary judgment. *See* [Dkt. #121].

The Court will grant the motion to dismiss based on the failure to exhaust administrative remedies under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671 *-et seq.* Further, summary judgment will be granted to the VA on the claims surrounding the failure of Memphis VAMC to provide medical attention to Mr. Thomas in November 2002.

With this disposition, all other pending motions will be denied as moot.[2]

I. FACTS

Mr. Thomas filed a claim for disability compensation with the VA on August 14, 1989, based, in part, on anxiety neurosis. As a result, on March 5, 1991, he was examined by

---

[2] Pending at this time are numerous motions, including: Plaintiff's Motion for Judgment on the Pleadings [Dkt. #94]; Plaintiff's Motion for Sanctions [Dkt. #95]; Plaintiff's Second Renewed Motion for Partial Summary Judgment [Dkt. #96]; Plaintiff's Motion for Sanctions [Dkt. #99]; and Plaintiff's Motion to Strike [Dkt. #145]. The motion to strike is part of Plaintiff's Opposition [Dkt. #131].

Mr. Thomas mistakenly asserts in his Opposition (*see* Pl.'s Opp. at 2) that various other motions he filed remain pending, when in fact they were stricken or denied: Pl.'s Renewed Cross-Motion for Partial Summ. J. [Dkt. #69], which was stricken by Order [Dkt. # 73]; Pl.'s First Mot. for Reconsideration [Dkt. #76], which was denied by Order [Dkt. #81]; Pl.'s Second Mot. for Reconsideration [Dkt. # 82], which was denied by Minute Order on Dec. 5, 2006; and Pl.'s [Third] Mot. for Reconsideration [Dkt. #109, set forth in Dkt. #92], which was denied by Order [Dkt. #151].

Dr. A.R. Kelly, a VA psychiatrist at the Washington, D.C., VA Medical Center. In his report of the examination, Dr. Kelly noted that Mr. Thomas had complained of regularly hearing voices in his head since about 1978 or 1979, which had persisted up to the date of the examination. However, because Mr. Thomas had "no other particular signs of schizophrenia," Dr. Kelly stated only that "a diagnosis of schizophrenia probably is the most likely correct diagnosis" without making a definite diagnosis. Def.'s Mem. in Supp. of Mot. to Dismiss or For Summ. J. [Dkt. #121] ("Def.'s Mem."), Ex. 2. Critically, however, he did not share this possible diagnosis with Mr. Thomas.

By a rating decision dated August 2, 1991, the VA granted Mr. Thomas a 40% combined disability rating for those conditions it determined to be service connected. Def.'s Mem., Ex. 3. It stated that "[s]ervice connection is denied for anxiety neurosis, as the last psychiatric -3- examination in service made no diagnosis regarding the veteran's mental status [and] [o]n the VA exam [conducted by Dr. Kelly], a final diagnosis was not made." *Id.* The August 1991 rating decision also did not mention the possibility that Mr. Thomas suffered from schizophrenia. The VA sent a Notification Letter on August 19, 1991, Def.'s Mem., Ex. 6, to Mr. Thomas's Service Representative, the Non-Commissioned Officers Association, which sent it to Mr. Thomas. *See* Plaintiff's Second Renewed Statement of Material Facts as to Which There Can Be No Genuine Dispute [Dkt. #96] ("Pl.'s Facts") ¶¶ 10-11.

Mr. Thomas filed what he deemed to be new material evidence in support of his claims of a service-connected disability on April 14, 1994. Def.'s Mem., Ex. 9. The Ratings Office found that the evidence submitted was not new and that it had been previously considered. *Id.*, Ex. 10. On November 10, 1999, Mr. Thomas appealed the adverse ratings decision to the Board of Veterans Appeals. In the

course of various disagreements over the Rating Office's determinations, Mr. Thomas received the VA's Statement of the Case ("SOC"). The SOC informed Mr. Thomas for the first time that the VA had identified a "working diagnosis" of schizophrenia on March 5, 1991.[3]

Thereafter, on October 11, 2001, Mr. Thomas filed an administrative claim on Form SF 95 with the U.S. Army Office of the Staff Judge Advocate, 1st Infantry Division, Katterbach Law Center, Germany, alleging that he had found out on October 27, 1999, that the VA had since August 10, 1991, willfully and intentionally withheld from him information concerning a serious medical condition which had caused him to suffer intentional emotional distress, exacerbation of his condition, and denial of federal and state benefits (the "2001 Claim"). Def.'s Mem., Ex. 14. The -4- VA denied the 2001 Claim on August 26, 2002:

> Under the Federal Tort Claims Act (FTCA), VA is responsible for any negligent or wrongful acts or omissions by VA employees acting within the scope of their employment which have caused death, personal injury, and/or property damage. After reviewing of our files and the materials you submitted in light of the issues you raised in your claims, we have found no such negligent or wrongful acts or omissions. Moreover, determinations regarding veteran's benefits are not reviewable under the FTCA. *See* Title 38 United States Code, Section 511(a).

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[3] The issue of when Mr. Thomas actually received the SOC is discussed *infra*. 3

> Accordingly, your claims are hereby respectfully denied.

Def.'s Mem., Ex. 24.Mr. Thomas filed this suit on August 30, 2002, alleging thirteen counts. The District Court dismissed the case on May 28, 2003. Mr. Thomas appealed, and the D.C. Circuit affirmed the dismissal on all but three counts – Counts III, V, and X. With regard to these Counts, the Circuit reversed and remanded, holding that the trial court had jurisdiction to consider non-benefits claims, *i.e.*, "whether the alleged withholding of the diagnosis [of schizophrenia] states a tort claim." *Thomas v. Principi*, 394 F.3d 970, 974 (D.C. Cir. 2005); *see also United States v. Brown*, 348 U.S. 110 (1954) (a veteran may maintain an action under the FTCA for negligent treatment at a VA medical center even if his benefits have already been increased because of such injury); *Glarner v. U.S. Dep't of Veterans Admin.*, 30 F.3d 697 (6 Cir. 1994). th

On remand, Mr. Thomas filed a First Amended Complaint[4] on March 1, 2006. The First Amended Complaint alleges the following Counts: 4 -5-

> Count I, failure to diagnose, inform, warn, and/or refer for treatment based on:
>
> a. schizophrenia
>
> b. major depression

[4] The original complaint named the Secretary as well as numerous VA employees as 4 defendants. The First Amended Complaint dropped the VA employees as defendants and named only the Secretary and three John Does. The Court dismissed the John Doe defendants on August 6, 2007. *See* Defs.' Mot. to Dismiss [Dkt. #111] and Order [Dkt. #133]. Thus, the only remaining defendant is the Secretary.

c. PTSD
d. Type B personality disorder
e. brain cancer or disease
f. arterial sclerosis
g. cerebral sclerosis
h. HWS syndrome
i. sleeplessness
j. insomnia
k. GAF or 55 - 60 [sic]
l. medical complaints of November 2002
m. severe personality disorder, somatization, fatigue,
nummular eczema, and bronchitis
n. paralysis
o. psychiatric examination of November 4 and/or 15, 2002
p. medical examination of November 8, 2000
q. medical examination of November 4 and/or 15, 2002
r. concealment
s. reliance
t. PTSD examination of July 23 and 24, 2003

Count II, gross negligence;
Count III, intentional infliction of emotional distress; and
Count IV, negligent infliction of emotional distress.

The First Amended Complaint contains allegations relating to events that occurred after the original complaint was filed on August 30, 2002. First, Mr. Thomas asserts that he visited the VA Medical Center in Memphis, Tennessee ("Memphis VAMC"), on November 4 and 15, 2002. He states that he went to the Medical Center "seeking assessment, evaluation and treatment for very severe chronic mental, physical complaints surrounding dizziness, blurred vision,

fear and a feeling lightheadedness . . . and a feeling of almost drifting in and out of consciousness/subconsciousness and the need of urgent medical treatment, to include psychiatric evaluation and/or treatment." Def.'s -6- Mem., Ex. 25 at 1-2. Memphis VAMC declined to provide medical services because his conditions did "not show[] current acuteness." *Id.* at 2. Thereafter, on a plane back to Germany, Mr. Thomas collapsed and experienced severe breathing problems. He was "strapped on/into a crew member's jump seat, where a heavy oxygen bottle was strapped around [his] neck and an oxygen mask placed over [his] nose and mouth, where [he] remained" for a great portion of the flight. *Id.* Mr. Thomas filed an FTCA claim based on this incident on November 30, 2002. *Id.*; *see generally*, Counts I.l, I.o, and I.q

Mr. Thomas submitted yet another administrative claim on March 14, 2003 (the "2003 Claim"). Mr. Thomas faxed an SF 95 claiming $10 million in damages to the VA Office of Regional Counsel in Washington, D.C., alleging:

> The VA and VA doctors failed to evaluate/diagnose, properly diagnose, inform, disclose, warn, treat, engage claimant in a process of inform[ed] consent, or refer claimant for treatment from March 5, 1991 to the present, for the following conditions:
>
> 1) Photophobia, 2) Cervical muscle and trapezius spasms, 3) failed to conduct Orthopedic examination, evaluate and diagnose orthopedic problems; 4) nummular eczema: 5) extreme fatigue; 6) constant tinnitus in both ears, Myositis of the shoulders; 7) Migratory Arthralgias and Tenosynovitis (pain in all joints); 8) Flexor Tender Ganglion of both hands; 9) Myofascial Pain; 10) Back, Right Flank and

> Musculosketal Pain; 11) A severe Personality Disorder; 12) Mental Stress; 13) Anxiety Neurosis with Somatization; 14) Somatic Concerns of a Chronic Nature; 15) Schizophrenia with Auditory
>
> Hallucinations; 16) Arthralgias of the Knees; 17) Bronchitis, Paryngitis, Laryngitis and Tonsillitis; 18) Numbness of Left Forearm, hand, leg, and arm. (See VA Rating Decision of 8-2-91); and for PTSD, Major Depressions and other complaints.

Def.'s Mem., Ex. 26.[5]

Mr. Thomas also complains about a July 24, 2003, medical examination at Memphis VAMC. *See* First Am. Compl. ¶ 95. He alleges that on that date, a VA physician requested that he undergo a medical examination and that he return to the Medical Center the next day for that purpose. Mr. Thomas contends that this request caused him to collapse in the doctor's office and that he suffered additional injuries and emotional distress. *See generally*, Count I.t.

The VA moved to dismiss or for summary judgment, Mr. Thomas responded, and the VA replied; thus, the case is ripe and ready for decision. This case was transferred to the undersigned on February 15, 2008.

II. LEGAL STANDARDS

[5] In fact, Mr. Thomas already had been diagnosed with some of these: somatization on June 5 14, 1982 and August 7, 1981, and severe personality disorder on February 4, 1980. Def.'s Mem., Ex. 5.

A. Motion to Dismiss for Lack of Jurisdiction

Federal courts are courts of limited jurisdiction and the law presumes that "a cause lies outside this limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Because subject matter jurisdiction is an Article III as well as a statutory requirement, "no action of the parties can confer subject[]matter jurisdiction upon a federal court.'" *Akinseye v. District of Columbia*, 339 F.3d 970, 971 (D.C. Cir. 2003). On a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), the plaintiff bears the burden of establishing that the court has subject matter jurisdiction. *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999); *see also McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 182-83 (1936).

Because subject matter jurisdiction focuses on the court's power to hear the claim, -8- however, the court must give the plaintiff's factual allegations closer scrutiny when resolving a Rule 12(b)(1) motion than would be required for a Rule 12(b)(6) motion for failure to state a claim. *Macharia v. United States*, 334 F.3d 61, 64, 69 (D.C. Cir. 2003). Moreover, the court is not limited to the allegations contained in the complaint. *Hohri v. United States*, 782 F.2d 227, 241 (D.C. Cir. 1986), *vacated on other grounds*, 482 U.S. 64 (1987). Instead, to determine whether it has jurisdiction over the claim, the court may consider materials outside the pleadings. *Herbert v. Nat'l Acad. of Scis.*, 974 F.2d 192, 197 (D.C. Cir. 1992).

B. Summary Judgment

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment must be granted when "the pleadings, depositions, answers to interrogatories, and admissions on

file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Diamond v. Atwood*, 43 F.3d 1538, 1540 (D.C. Cir. 1995). Moreover, summary judgment is properly granted against a party that "after adequate time for discovery and upon motion . . . fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. To determine which facts are "material," a court must look to the substantive law on which each claim rests. *Anderson*, 477 U.S. at 248 (1986). A "genuine issue" is one whose resolution could establish an element of a claim or defense and, therefore, affect the outcome of the action. *Celotex*, 477 U.S. at 322; *Anderson*, 477 U.S. at 248.

In ruling on a motion for summary judgment, the court must draw all justifiable -9- inferences in the nonmoving party's favor and accept the nonmoving party's evidence as true. *Anderson*, 477 U.S. at 255. A nonmoving party, however, must establish more than "the mere existence of a scintilla of evidence" in support of its position. *Id.* at 252. To prevail on a motion for summary judgment, the moving party must show that the nonmoving party "fail[ed] to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. By pointing to the absence of evidence proffered by the nonmoving party, a moving party may succeed on summary judgment. *Id.* In addition, the nonmoving party may not rely solely on allegations or conclusory statements. *Greene v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999); *Harding v. Gray*,

9 F.3d 150, 154 (D.C. Cir. 1993). Rather, the nonmoving party must present specific facts that would enable a reasonable jury to find in its favor. *Greene*, 164 F.3d at 675. If the evidence "is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (citations omitted).

III. ANALYSIS

Mr. Thomas advances claims concerning a failure to diagnose, inform, warn, and/or refer for treatment for schizophrenia and numerous other conditions as set forth in his 2001 Claim and his 2003 Claim, both referring to the benefits examination conducted by Dr. Kelly in March 1991. He also alleges failure to diagnose, inform, warn, and/or refer for treatment based on November 2002 and July 2003 visits to Memphis VAMC. The VA asserts that most of Mr. Thomas's claims should be dismissed for failure to exhaust administrative remedies, and, with regard to the November 2002 visits to Memphis VAMC, summary judgment should be granted due to failure to present expert testimony. -10-

A. Failure to Exhaust Remedies under the FTCA

Absent a specific waiver, the United States is protected from suit by the doctrine of sovereign immunity. *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 475 (1994). The FTCA extends a limited waiver of sovereign immunity, which provides a remedy against the Federal Government for some torts committed by federal employees in the scope of their employment. 28 U.S.C. § 1346(b); *Sloan v. Dep't of Housing and Urban Dev.*, 236 F.3d 756, 759 (D.C. Cir. 2001). The FTCA bars claimants from bringing suit until they have exhausted their administrative remedies. *McNeil v. United*

States, 508 U.S. 106, 113 (1993); *see also* 28 U.S.C. § 2675(a) ("[a]n action shall not be instituted upon a claim against the United States . . . unless the claimant shall have first presented the claim to the appropriate Federal agency."). The exhaustion requirement is a mandatory jurisdictional prerequisite, *GAF Corp. v. United States*, 818 F.2d 901, 905 (D.C. Cir. 1987); *Jackson v. United States*, 730 F.2d 808, 809 (D.C. Cir. 1984), which the Court cannot excuse. As Plaintiff, Mr. Thomas bears the burden of proving by a preponderance of the evidence that the Court has subject matter jurisdiction to review his claims. *See Evans*, 166 F.3d at 647; *see also McNutt*, 298 U.S. at 182-83.

In order to exhaust administrative remedies under the FTCA, a plaintiff must have presented the agency with "(1) a written statement sufficiently describing the injury to enable the agency to begin its own investigation and (2) a sum-certain damages claim," and the agency must have either denied the claim in writing or failed to provide a final disposition within six months of the filing of the claim. *GAF Corp.*, 818 F.2d at 905; *accord Bembenista v. United States*, 866 F.2d 493, 499 (D.C. Cir. 1989); *Murphy v. United States*, 121 F. Supp. 2d 21, 27 (D.D.C. 2000), *aff'd*, 64 Fed. Appx. 250 (D.C. Cir. 2003). The claimant must present the administrative claim to the -11-relevant agency within two years of the claim's accrual. *See* 28 U.S.C. §§ 2401(b), 2675(a). A tort claim accrues "by the time a plaintiff has discovered both his injury and its cause." *Sexton v. United States*, 832 F.2d 629, 633 (D.C. Cir. 1987).

1. 2001 Claim Was Not Timely

The Court will dismiss all claims relating to Mr. Thomas's allegations of failure to diagnose, inform, warn, and/or refer for treatment for schizophrenia as set forth in his 2001 Claim.

Such claims are based on the benefits examination conducted by Dr. Kelly in March 1991, and Mr. Thomas failed to file an administrative claim within two years after such claims accrued.

Mr. Thomas argues that the statute of limitations did not begin to run until early 2002 when he received a full copy of his VA medical file in response to his request under the Privacy Act, 5 U.S.C. § 552a, and the Freedom of Information Act, 5 U.S.C. § 552. He argues that "the information in the SOC raised curiosity, concerns, misunderstanding and confusion, but provided absolutely no knowledge, indication or basis to think or believe that there had been anything wrong other than a mistake or misstatement of facts by the VA; as there was, at the time, no hint or indication of evidence of a tortious act." Pl.'s Mem. in Opp. to Def.'s Mot. to Dismiss or for Summ. J. ("Pl.'s Mem.") at 21.

This argument must fail. Under D.C. law,[6] a plaintiff is deemed to have discovered 6 his injury when he knew or reasonably should have known of it. *Richards v. Duke Univ.*, 480 F. Supp. 2d 222, 235 (D.D.C. 2007). Mr. Thomas's 2001 Claim, which he submitted to the Army in -12- Germany, reveals that he had enough information from the SOC to have known of his alleged injury.

In the 2001 Claim, he alleged:

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[6] Tort claims under the FTCA are reviewed under the substantive tort law of the state in 6 which the alleged tort occurred. *See Price v. United States*, 228 F.3d 420, 422 (D.C. Cir. 2000); *Tarpeh-Doe v. United States*, 28 F.3d 120, 123 (D.C. Cir. 1994). Mr. Thomas's 2001 Claim is based on allegations of malpractice that occurred in Washington, D.C.

> On or about August 19, 1991 and for more than 10 years, the US Department of Veterans Affairs and Employees at the Washington DC Regional Office in Washington, DC, by and through their willful, wanton, and intentional negligence, omissions, carelessness, error(s) in judgment and misconduct, has [sic] caused and continues to cause and inflicted [sic] upon me great and serious injuries, harm, pain and intentional emotional distress by their failure(s) to give me notice, failure(s) and refusal(s) to treat and provide me with the standard of care and to warn me of a serious medical condition DVA diagnosed during a regular C&P [Compensation and Pension] examination in August 1991, which DVA willfully and wantonly withheld from me for 10 year[s] or more, and which has also resulted in the development and my sustaining and suffering more serious medical problems than previously existed (permanent impairments); and which has also caused me and my family to be denied numerous State and Federal benefits, loss of income, to include earning capacity.

Def.'s Mem., Ex. 14. The claim form itself demonstrates that Mr. Thomas had enough information from the SOC to seek money damages in October 2001 for the VA's failure to warn him of the alleged diagnosis of schizophrenia.[7] Therefore, his

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[7] The Court is puzzled by Mr. Thomas's argument that "it is true, this Court *does not* have 7 subject[]matter jurisdiction over any of Plaintiffs' FTCA claims under the FTCA framework," Pl.'s Mem. at 26, and that "this Court *does not* have subject[]matter jurisdiction over Plaintiff's complaint allegations and claims under the FTCA framework for the reasons already alleged and argued, and
the Defendant's and this Court's continued adjudicative proceedings under this framework is both prejudice and injurious to Plaintiff." Pl.'s

claim accrued when he received the SOC and 7 not in 2002 when he received his entire file.

The only direct evidence in the record as to *precisely when* Mr. Thomas received the -13- SOC is a letter from Mr. Thomas to the VA in Washington, D.C., dated November 2, 1999.[8] That 8 letter stated:

> The veteran is in receipt of your letter and enclosed Decision(s) and Statement of the Case(s), herein not included, (received by the veteran on October 9, 1999), for an Appeal of an Earlier Effective Dated [sic] for compensation purposes based on Individual Unemployability, and the denial of service-connection for Anxiety Neurosis and other Mental Problems.
>
> The purpose of this correspondence (being sent to you via facsimile) is to request a Sixty-day Extension of the time limit within which to effect and file my substantial Appeal to the Board of Veterans Appeals.

Def.'s Mem., Ex. 47. Thus, Mr. Thomas acknowledged receiving on October 9, 1999, the VA's SOC indicating a "working diagnosis" of schizophrenia.
Mr. Thomas does not address this letter or explain why, in November 1999, he acknowledged receipt of the SOC on October 9, 1999, and then, in connection with the 2001

Mem. at 29. The Court assumes that Mr. Thomas means to argue that the Court does have jurisdiction over his claims.

[8] Interestingly, Mr. Thomas faxed this letter to the VA's Washington, D.C. Regional Office 8 (Foreign Unit) in 1999. It is unclear why he submitted his October 2001 Claim to the Army in Germany when the claim itself identifies the VA as the responsible department.

Claim asserted that the date he became aware of the SOC on October 27, 1999. *See* Pl.'s Facts ¶ 12. Mr. Thomas further states, in non-affidavit form, that "[o]n October 27, 1999, Plaintiff became alarmed, mad, outraged, angry, sad, hurt, felt deceived, mistreated, severely emotionally distressed and shocked of [sic] not having been informed and denied the rights as a patient, and due process right as a Veteran over many years of this diagnosis, and of having further been denied and deprived of medical information and treatment over this same long period of time." Pl.'s Facts ¶ 13.

To resolve this question, which goes to the heart of the Court's jurisdiction, the Court -14- may consider affidavits and other exhibits and weigh the conflicting evidence. *See Herbert*, 974 F.2d at 197; *Rann v. Chao*, 154 F. Supp. 2d 61, 64 (D.D.C. 2001), *aff'd* 345 F.3d 192 (D.C. Cir. 2003). The Court finds the November 2, 1999, letter and Mr. Thomas's silence about it compelling evidence that Mr. Thomas received the SOC on October 9, 1999. Thus, this is when his claim accrued and the statute of limitations for him to file an administrative claim began. There is no doubt on this record that Mr. Thomas had sufficient information from the SOC to advance an FTCA claim as his own statements and the 2001 Claim demonstrates. In his own words, he admitted receiving that information on October 9, 1999. Further, his written admission was dated November 2, 1999, just a few weeks after such receipt at a time when the importance of a few days' difference was not apparent. Therefore, a timely FTCA claim had to be made no later than October 9, 2001. Mr. Thomas did not timely file an administrative claim. At the earliest, Mr. Thomas filed his claim with the Army on October 11, 2001.[9]

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[9] The VA contends that administrative filing was timely only if the VA itself received the 9 form by October 9, 2001 and that the VA did not

To reiterate: Mr. Thomas received the SOC on October 9, 1999, which informed him that a potential diagnosis of schizophrenia had been made. He therefore had until October 9, 2001, to file an FTCA claim based on the failure to inform him of this potential diagnosis. He filed the claim on October 11, 2001, after the statute of limitations had run.[10] Because Mr. Thomas failed to 10 -15- timely file an administrative claim, the Court lacks jurisdiction over Mr. Thomas's claims regarding the alleged failure to inform or treat him for schizophrenia, Counts Ia, II, III, and IV, and any unnumbered counts relating to Mr. Thomas's 2001 Claim.[11]

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receive the claim until November 14, 2001, when Mr. Thomas faxed it to the VA in Washington, D.C. Mr. Thomas contends that he faxed the form to the VA on October 25, 2001. Whether his filing with the Army on October 11, 2001 was sufficient or whether the VA received his claim by fax on October 25, 2001 or by fax on November 14, 2001 is immaterial; all of these dates are too late to file a claim arising from the acknowledged failure to inform Mr. Thomas of the potential diagnosis of schizophrenia.

10 Mr. Thomas also suggests that his Form 9 Appeal to the Board of Veterans Appeals, filed 10 on November 10, 1999, should be deemed a timely FTCA Claim since it met all of the regulatory requirements to be considered an FTCA claim except that it did not contain a sum certain. Pl.'s Mem. at 35. This filing fails to contain a sum certain and thus it is in insufficient to present a valid administrative claim. *GAF Corp.*, 818 F.2d at 905.

11 The VA also argues that Dr. Kelly made no firm diagnosis because Mr. Thomas did not 11 exhibit sufficient symptoms of schizophrenia and that there was no duty to inform him of the nonurgent results of a benefits examination. It presents the declaration of Richard Rosse, M.D., Chief, Psychiatry Service, at the Washington, D.C., VA Medical Center. Dr. Rosse declares that a diagnosis of schizophrenia requires "two or more of the characteristic active phase symptoms of schizophrenia, which include delusions, hallucinations, disorganized speech, grossly disorganized or

Mr. Thomas argues that the D.C. Circuit has already ruled in his favor on appeal in spite of similar jurisdictional arguments from the VA, and therefore the jurisdictional arguments are barred. This argument mis-reads the record. The Court of Appeals reversed the prior district court opinion but did not address, or rule on, any of the VA's arguments except the one relied on by the district court in the first instance: whether all of the counts in the initial Complaint here constituted a challenge to a VA benefits decision. *See Thomas*, 394 F.3d at 974-75. The Circuit did not rule on whether Mr. Thomas presented his claims to the VA on a timely basis.[12] Moreover, jurisdiction is 12 a defense that can be raised at any time prior to a final ruling on the merits. *See Settles v. United States Parole Comm'n*, 429 F.3d 1098, 1105 (D.C. Cir. 2005). Even when not raised by any party, the Court itself has a duty to ensure its own jurisdiction at any time in a case. *See American Library Ass'n v. FCC*, 401 F.3d 489, 492 (D.C. Cir. 2005). Thus, the VA's jurisdictional arguments are -16- properly before this Court.

Mr. Thomas also moves to strike the VA's motion and exhibits because the exhibits contain very personal private and sensitive medical records and are also "incomplete, unfit, unreliable and/or untrustworthy as evidence" because they involve a veteran's benefit claim. Mr. Thomas also argues that defense Exhibits 15 through 20 "are FTCA claim transfer documents" that were not provided to him in discovery and that are now prejudicial. The Court recognizes that it is without jurisdiction to review the VA's handling of a veteran's

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catatonic behavior, and negative symptoms." Rosse Decl. ¶ 2. Because the Court finds that it lacks jurisdiction, it does not reach this issue.

[12] Further, the Circuit could not have ruled on the claims regarding later events, such as 12 claims regarding Mr. Thomas's visits to Memphis VAMC that were added after remand.

benefit claim. *See Thomas*, 394 F.3d at 974-75. However, the documents to which Mr. Thomas objects are presented for purposes of ruling on the timeliness of his FTCA claims and their sufficiency to alert the VA to the nature of his FTCA claims, not for purposes of reviewing any VA benefit decisions. Exhibits 15 through 18 are letters that the Army sent to Mr. Thomas in response to his FTCA claim erroneously filed with the Army in Germany; Exhibit 19 is a copy of the envelope whereby the Army in Germany forwarded Mr. Thomas's claim papers to Fort Meade in Maryland; and Exhibit 20 is a copy of the cover letter whereby the Army sent the file to the VA, with a copy to Mr. Thomas. Inasmuch as Mr. Thomas was the addressee or copied on these materials, the Court finds the VA's reliance on them here – to complete the record – permissible. Indeed, Mr. Thomas himself relies on these same documents. Mr. Thomas's motion to strike will be denied.

2. The 2003 Claim Lacked Required Specificity

Mr. Thomas's 2003 Claim alleged that the VA failed to diagnose, disclose, or refer him for treatment from March 1991 to the present for numerous conditions, including among others: photo phobia, muscle spasms, fatigue, joint pain, flexor tender ganglion, myofacial pain, back and musculoskeletal pain, personality disorder, mental stress, anxiety neurosis, schizophrenia, arthralgia, -17- bronchitis, numbness, post traumatic stress disorder, and depression. On April 29, 2003, Regional Counsel Michael Hogan responded and informed Mr. Thomas that "[t]he Attorney's General's Regulations require that you provide us with certain information and evidence that we need to process and investigate your claim." *See* Def.'s Mem., Ex. 44. The VA sought a complete list of health care providers outside the

VA system who had been caring for Mr. Thomas, those whom he consulted for symptoms allegedly related to poor care from the VA, a report from his attending physician concerning the same, and other details. *Id.* Receiving no response, Mr. Hogan wrote to Mr. Thomas on July 1, 2003, denying his claim for failing to provide essential information. Def.'s Mem., Ex.45. Mr. Thomas requested reconsideration by letter dated October 23, 2003, which was denied by VA Assistant General Counsel E. Douglas Bradshaw, Jr., on November 20, 2003. Def.'s Mem., Ex. 46.

Mr. Thomas's failure to respond to Mr. Hogan's request for more information renders his administrative exhaustion incomplete and insufficient to support court jurisdiction. The SF 95 submitted as the 2003 Claim lists specific diseases and conditions but fails to provide information as to where the alleged torts occurred or when. The VA contends that "[s]earching all DVA files nationwide for a 12-year period to determine when and where VA could or should have diagnosed, referred, treated, or informed [Mr.] Thomas of over twenty medical conditions would be equivalent to searching for a needle in a haystack." Def.'s Mem. at 14-15. The Court agrees. Mr. Thomas was obliged to respond to the VA's request for information. He needed to submit a written statement sufficiently describing the injury to enable the agency to begin its own investigation. *Bowden v. United States*, 106 F.3d 433, 441 (D.C. Cir. 1997); *GAF' Corp.*, 818 F.2d at 919. The 2003 FTCA Claim provided grossly insufficient information for the VA to know who, how, where and when the -18- alleged malpractice occurred. Its request for further information was totally ignored by Mr. Thomas, yet his silence prevented administrative processing of his claim. Since his claim could not be processed due to Mr. Thomas's own conduct, the Court finds that he did not

exhaust his administrative remedies and cannot now present this set of claims in litigation. Counts I.b-k, I.m-n, I.p., and I. r-s, together with all unnumbered counts based on the 2003 Claim, will be dismissed for lack of jurisdiction.

3. Failure to Present Any Claim Based on the July 24, 2003 Visit to VAMC Memphis

Count 1t of the Amended Complaint alleges torts based on a July 24, 2003 medical examination at Memphis VAMC. The FTCA bars claimants from bringing suit until they have exhausted their administrative remedies, *McNeil*, 508 U.S. at 113, and the VA never received an SF-95 after July 24, 2003 that encompassed this claim. *See* Def.'s Mem., Ex. 2, Decl. of Baltimore Regional Counsel Frank D. Giorno ¶ 4; Def.'s Mem., Ex. 3, Decl. of Nashville Regional Counsel Tammy L. Kennedy ¶ 5. Mr. Thomas offers no proof whatsoever to counter these sworn declarations, despite the fact that he bears the burden of establishing that the court has subject matter jurisdiction. *Evans*, 166 F.3d at 647; *see also McNutt*, 298 U.S. at 182-83. Because Mr. Thomas failed to exhaust his administrative remedies concerning the July 24, 2003, medical examination at Memphis VAMC, the Court is without power to adjudicate this claim. Count 1t and all unnumbered counts relating to Mr. Thomas's July 2003 visit to Memphis VAMC will be dismissed.

B. Failure to Present Expert Testimony In Support of Claims Relating to November 2002 Visits to Memphis VAMC

Mr. Thomas filed a timely FTCA claim associated with his visit to Memphis VAMC on November 4 and 15, 2002, at

which time he alleges he was not informed, referred, or warned for -19- "needed and necessary emergency medical complaints." First Am. Compl. ¶ 92. He also alleges that Memphis VAMC put information in his medical records concerning migraine headache, limited motion of cervical spine, allergic or vasomotor rhinitis, degenerative arthritis, prostate gland condition, inflammation of cornea, and Axis IV, without informing him. *Id.* This claim was denied by Regional Counsel on June 7, 2005. Def.'s Mem., Ex. 42.

To establish a *prima facie* case of negligence under Tennessee law,[13] a plaintiff bears 13 the burden of proving (1) the "recognized standard of acceptable professional practice" in the relevant speciality; (2) that the defendant "acted with less than or failed to act with ordinary and reasonable care in accordance with such standard;" and (3) "as a proximate result of the defendant's act or omission, the plaintiff suffered injuries which would not otherwise have occurred." Tenn. Code § 29-26-115. "No claim for negligence can succeed in the absence of any one of these elements." *Kilpatrick v. Bryant*, 868 S.W.2d 594, 598 (Tenn. 1993).

A plaintiff must "prove by expert testimony" all four elements of the negligence standard. *Hurst by Hurst v. Dougherty*, 800 S.W.2d 183, 185 (Tenn. Ct. App. 1990). A "plaintiff must offer expert testimony setting forth specific facts demonstrating that a defendant's acts or omissions fell below the recognized standard of care and that those acts or omissions proximately caused the subject injury." *Norris v. East Tn. Children's Hosp.*, 195 S.W.3d 78, 86 (Tenn. Ct.

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[13] Tennessee law governs this malpractice claim as Memphis VAMC is located there. *See* 13 *Price*, 228 F.3d at 422 (the substantive tort law of the state in which the alleged tort occurred applies to FTCA tort claims); *Tarpeh-Doe*, 28 F.3d at 123 (same).

App. 2005). Tennessee law also requires that any expert be licensed to practice in the relevant specialty in Tennessee or one of the contiguous border states within one year of when the injury or wrongful act or omission occurred. Tenn. Code § 29-26-115(b).

Mr. Thomas traces the failure to provide medical services to him at Memphis VAMC with his collapse on the airplane returning to Germany and his resulting emotional distress. Whether the VA might have any liability would depend upon whether Mr. Thomas's statements on intake at Memphis VAMC were sufficient to cause a reasonable health care provider to recognize a need for immediate medical attention and, then, whether the failure to provide such attention at Memphis VAMC medically caused his collapse. These points must be made through medical testimony by an experienced physician. Under Tennessee law, they cannot be proved by lay testimony.

Without sufficient evidence to prove the standard of care, that the VA's actions in denying him medical treatment in November 2002 fell below that standard, and that the VA's denial of care was causally connected to his collapse on the airplane, Mr. Thomas cannot sustain his allegations. *See Greene*, 164 F.3d at 675 (nonmoving party may not rely solely on allegations, but must present specific facts that would enable a reasonable jury to find in its favor). Counts I.l, I.o, I.q., and all unnumbered counts based on allegations relating to the November 2002 visit to Memphis VAMC must be dismissed.

IV. CONCLUSION

The results here are compelled by federal and Tennessee state law. A claimant under the FTCA must file his claim

within two years of its accrual. Although he received the SOC on October 9, 1999, the very earliest date on which it might be said that Mr. Thomas filed an FTCA claim based on the failure-to-inform him of Dr. Kelly's potential schizophrenia diagnosis is October 11, 2001, more than two years later. Because timely presentation of a claim is jurisdictional, the Court must dismiss all allegations based on the failure to inform of a schizophrenia diagnosis.

In addition to complying with the two-year requirement, a claimant must provide sufficient information
for the relevant agency to investigate and respond. Mr. Thomas failed to respond to VA's request for specific information concerning his malpractice claim that spanned a dozen years and over a dozen medical conditions. His inaction and silence prevented the VA from processing his claim on the merits and, therefore, he did not fulfill his duty to exhaust his administrative remedies. Further, there is no record that Mr. Thomas ever filed an FTCA claim arising from his July 23, 2004, visit to Memphis VAMC and, therefore, he also failed to exhaust his administrative remedies therewith.

Finally, the VA is entitled to summary judgment on Mr. Thomas's allegations concerning the failure of Memphis VAMC to provide medical treatment to him in November 2002. Tennessee law requires expert testimony to support his malpractice claim, and Mr. Thomas offers none.

Defendant's motion to dismiss or for summary judgment [Dkt. # 121] will be granted and the First Amended Complaint will be dismissed. Plaintiff's motion to strike [Dkt. #145] will be denied, and all other pending motions will be denied as moot. A memorializing order accompanies this Memorandum Opinion.

DATE: March 20, 2008

/s/
ROSEMARY M. COLLYER
United States District Judge

United States Court of Appeals for the District of Columbia Circuit

Argued November 12, 2004 Decided January 14, 2005

No. 03-5182

OSCAR L. THOMAS,
APPELLANT

V.

ANTHONY J. PRINCIPI, SECRETARY,
DEPARTMENT OF VETERANS AFFAIRS, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 02cv01743)

Matthew T. Reinhard, appointed by the court, argued the cause as amicus curiae in support of appellant. With him on the briefs was *Alan I. Horowitz*.

Oscar L. Thomas, pro se, filed briefs for appellant.
Pamela D. Huff, Assistant U.S. Attorney, argued the cause for appellees. With her on the brief were *Kenneth L. Wainstein*, U.S. Attorney, and *Michael J. Ryan*, Assistant U.S. Attorney.

Before: GINSBURG, *Chief Judge*, and TATEL and ROBERTS, *Circuit Judges*.

TATEL, *Circuit Judge*: The Veterans' Judicial Review Act not only provides that the Secretary of Veterans Affairs "shall decide all questions of law and fact necessary to a decision . . . under a law that affects the provision of benefits," but also bars district courts from reviewing such decisions. In this case, we must decide whether this provision deprives the district court of jurisdiction over an action brought pursuant to the Federal Tort Claims Act by a veteran asserting (among other things) that the VA failed to inform him that a VA doctor had diagnosed him with schizophrenia. Because adjudicating this claim would not require the district court to review a question "necessary to a decision . . . under a law that affects the provision of benefits," we reverse the district court's dismissal of the complaint and remand for further proceedings consistent with this opinion.

I.

Reviewing the district court's dismissal of the complaint for lack of subject matter jurisdiction and failure to state a claim, *see* Fed. R. Civ. P. 12(b)(1), (6), "we construe the complaint liberally, granting plaintiff the benefit of all inferences that can be derived from the facts alleged." *Barr v. Clinton*, 370 F.3d 1196, 1199 (D.C. Cir. 2004) (internal quotation marks omitted). Viewed through that lens, the record reveals the following.

Appellant Oscar L. Thomas, following his honorable discharge from the United States Army, filed for mental and physical disability benefits with the Department of Veterans Affairs in 1989. Two years later, a VA doctor concluded that Thomas had "persistent auditory hallucinosis which is

troubling, so a diagnosis of schizophrenia is the most likely correct diagnosis. Some of the other adjunct symptoms are not present, however, but this will be the working diagnosis for him. He has slight social and industrial disability resulting from this." The VA nevertheless denied Thomas's claim, stating in a letter to him that a "final diagnosis was not made." Neither the rating decision nor the doctor's report was mentioned in the letter or attached to it. *See Thomas v. Principi*, 265 F. Supp. 2d 35, 37 (D.D.C. 2003); *see also* Appellee's Br. at 4.

Thomas pursued a variety of appeals and claims for benefits. Not until 1999, however, some eight years after the VA doctor saw him, did the VA reveal to Thomas that the doctor had diagnosed him with schizophrenia. Alleging that the VA had wrongfully withheld notice of his diagnosis, thereby severely limiting his ability to pursue his livelihood, Thomas appealed to the Board of Veterans' Appeals. That appeal remains pending.

In 2001, Thomas filed an administrative tort claim—a prerequisite to bringing suit under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2675(a). Like Thomas's appeal to the Board, this claim asserted that the VA's failure to disclose the schizophrenia diagnosis and to treat him resulted in greater medical problems, denial of state and federal benefits, and loss of income, including earning capacity. Although the administrative tort claim also remains pending, the VA is deemed to have finally denied the claim because it failed to "make a final disposition of [the] claim within six months after it [was] filed." *See id.*; *see also Thomas*, 265 F. Supp. 2d at 38.

Acting pro se, Thomas filed suit in the United States District Court for the District of Columbia, alleging that the

VA had committed medical malpractice and caused him intentional emotional distress by failing to inform him of the working diagnosis of schizophrenia. In addition to these FTCA claims, the forty-four-page complaint alleges Privacy Act violations, constitutional violations by the VA and several VA employees, defamation, fraud, loss of consortium, and estoppel. In his prayer for relief, Thomas requested compensatory and punitive damages of over one billion dollars from both the government and individual VA employees.

The VA moved to dismiss, or alternatively for summary judgment. Among other things, the VA argued that Thomas's FTCA claim was jurisdictionally barred by 38 U.S.C. § 511, which prohibits district courts from reviewing "all questions of law and fact necessary to a decision by the Secretary [for Veterans Affairs] under a law that affects the provision of benefits by the Secretary to veterans."

The district court agreed with the VA, granting its motion to dismiss the FTCA claims for lack of subject matter jurisdiction. 265 F. Supp. 2d at 41. Reasoning that "the gravamen of plaintiff's claim is that [the VA] . . . failed to treat [him] . . . for schizophrenia . . . and other medical conditions," the district court found that judicial review "would require the Court to second-guess medical judgments made by DVA." *Id.* at 39. Thus, "[a] favorable decision as to plaintiff's claims would entail a finding that defendants should have provided a particular quantum of medical treatment to plaintiff that they did not in fact provide . . . . [S]uch a finding is flatly forbidden by § 511." *Id.* at 39.

Via the same analysis, the district court dismissed Thomas's Privacy Act and constitutional claims for lack of subject matter jurisdiction. *Id.* at 39-40. Finding that

Thomas's defamation and fraud claims, though perhaps permissible under section 511, were excluded from the FTCA's sovereign immunity waiver, the district court dismissed these claims as well. *Id.* at 40. Finally, the court denied Thomas's request for leave to amend his complaint to add (1) a Privacy Act claim against the Assistant United States Attorney for discussing Thomas's medical records in the VA's motion to dismiss, (2) another tort claim against the VA for failure to "diagnose, inform, warn, or treat," and (3) a legal malpractice claim against Thomas's former legal representatives for failing to give him documents sent to them by the VA. *Id.* at 40 n.5.

Following Thomas's timely appeal, we appointed amicus curiae, who has ably briefed and argued Thomas's FTCA claims. We consider those claims in Part II and Thomas's other claims in Part III.

II.

The VA argues that the "District court properly granted summary judgment in favor of the government [because] Thomas did not provide any evidence that the VA's action were [*sic*] wrongful." Appellee's Br. at 9. This argument suffers from two defects. First, it rests on an incorrect premise. The district court did not grant summary judgment for the government. Instead, it dismissed Thomas's complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The government did file a motion for summary judgment as an alternative to its motion to dismiss, but the district court granted only the latter. Second, Thomas's failure to "provide any evidence" is hardly surprising given that the district court's ruling preceded discovery, mooting Thomas's motion to commence discovery.

Both in its brief and at oral argument, the VA also suggested that Thomas may not in fact suffer from schizophrenia. The VA, however, does not deny that for eight years it failed to advise Thomas of the working diagnosis of schizophrenia, and whether or not Thomas actually suffers from schizophrenia is a question the district court will have to resolve *if* it has jurisdiction over Thomas's FTCA claim. We now turn to that jurisdictional issue.

Section 511 provides:

> The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. . . [T]he decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise. 38 U.S.C. § 511.

Other provisions of the Act demarcate the path to appellate review of secretarial benefits decisions: claimants may first appeal to the Board of Veterans' Appeals, *id.* § 7104(a), then to the Court of Appeals for Veterans' Claims, *id.* § 7252(a), to the Federal Circuit, *id.* § 7292(c), and ultimately to the Supreme Court, *id.*

According to the VA, "[f]ederal courts construing the predecessors to section 511 have consistently recognized that the statute barred district court consideration of individual claims for veterans' benefits." Appellee's Br. at 11. True

enough, but our task here is to determine whether Thomas has presented any such claims.

We have addressed section 511's scope only once. In *Price v. United States,* we held that "the district court lacked jurisdiction to consider [appellant's] federal claim because underlying the claim is an allegation that the VA unjustifiably denied him a veterans' benefit." 228 F.3d 420, 421 (D.C. Cir. 2001) (per curiam). Assuming appellant's damages claim was cognizable under a Florida tort statute, we found that the Florida cause of action depended on whether the insurer–in that case the VA–had acted in bad faith. *Id.* at 422. Reasoning that a "determination whether the VA acted in bad faith or with negligence would require the district court to determine first whether the VA acted properly in handling Price's request for reimbursement," we concluded that section 511 foreclosed judicial review. *Id.*

Applying *Price* to the facts of this case, we must determine whether adjudicating Thomas's claims would require the district court "to determine first whether the VA acted properly in handling" Thomas's benefits request. *Id.* Given that we hold pro se complaints "to less stringent standards than formal pleadings drafted by lawyers," *Haines v. Kerner*, 404 U.S. 519, 520 (1972), and giving Thomas the benefit of all inferences, as we must at this stage of the litigation, we think he has alleged at least some VA actions that the district court can adjudicate without "determin[ing] first" whether Thomas was entitled to a certain level of benefits.

For example, Count III, alleging intentional infliction of emotional distress, states that "Defendants [*sic*] outrageous conduct in covering up the presence of a diagnosis of Schizophrenia with slight social and industrial disability because of this, for more than 10 years, was intentionally and recklessly directed at Plaintiff." Compl. ¶ 31. Count V,

labeled "Gross Negligence, Medical Negligence, and Legal Misconduct," alleges that defendants negligently "failed to inform Plaintiff of the diagnosis, and about the risk of an untoward outcome." Compl. ¶ 62. Similarly, Count X, entitled "Medical Malpractice," alleges that [e]ach of these defendants failed to take responsibility by not ensuring and taking time to communicate the risks and choices that were available to Plaintiff, e.g., the right to know, (1) you have been diagnosed with Schizophrenia with slight social and industrial impairment because of this, (2) you have the choices of receiving medical treatment care from DVA, or to not receive treatment from DVA, and we let you make these choices; or inform Plaintiff that . . . 'your claims for Schizophrenia is [*sic*] denied.' Compl. ¶ 95.

Because none of these claims alleges that the VA failed to pay for treatment (or even to provide for treatment), they raise no "questions of law [or] fact necessary to a decision by the Secretary under a law that affects the provision of benefits." 38 U.S.C. § 511. The raised "questions of law and fact" relate to whether the alleged withholding of the diagnosis states a tort claim, and resolution of those questions is not "necessary" to the benefits determination. *See id.* Putting the issue in *Price*'s terms, no denial of benefits "underl[ies]" Thomas's failure-to-inform allegations. *See* 228 F.3d at 421. In reaching a different conclusion, the district court cited the regulatory definition of "benefit," which includes "any . . . service, . . . entitlement to which is determined under laws administered by the Department of Veterans Affairs pertaining to veterans." 38 C.F.R. § 20.3(e). But neither the district court nor the VA maintains that "service" spans so broadly as to encompass an alleged duty to inform. Indeed, when pressed at oral argument, counsel for the VA agreed that if a VA doctor left a sponge inside a

patient during surgery, section 511 would permit an FTCA malpractice suit in district court. Reiterating our reliance on *Price*, we reject any implication that all action or inaction by the VA represents a type of "service," and therefore automatically constitutes a "benefit."

To be sure, as amicus acknowledges, not all of Thomas's tort allegations survive the standard articulated in *Price*. For example, Count X alleges that the VA "failed to render the appropriate medical care services that are delivered to alleviate a harmful medical condition, which is calculated to prevent, diagnose, correct, cure, alleviate, or prevent the worsening in the Plaintiff." Compl. ¶ 109. Likewise, Count III claims (among other things) that the VA's "continuous and persistent deprivation and denial of known needed and necessary medical care treatment . . . caused Plaintiff severe emotional distress." Compl. ¶ 29. Because adjudicating these allegations—failure to "render appropriate medical services" and "denial of . . . necessary medical care treatment"—would require the district court "to determine first whether the VA acted properly" in providing Thomas benefits, these claims are barred by section 511. *See Price*, 228 F.3d at 422. The district court's lack of jurisdiction over these claims, however, has no effect on its ability to consider the non-benefits claims also raised in Counts III, V, and X.

III.

Without benefit of amicus curiae, Thomas also challenges the district court's dismissal of his Privacy Act and *Bivens* claims, as well as its denial of his motion for leave to amend. These arguments require little discussion.

As to Thomas's Privacy Act claims, the district court correctly found them barred by section 511. Unlike the FTCA claims, counts XI and XII allege only that the VA's failure to maintain accurate and complete records adversely affected Thomas's benefits determinations.

Thomas's constitutional claims for money damages against VA employees are also barred. Under *Bivens*, "special factors" may counsel "hesitation in the absence of affirmative action by Congress" establishing liability for the acts of individual government employees. *See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 396 (1971). "Special factors" include "an elaborate remedial system" constructed by Congress "with careful attention to conflicting policy considerations." *Bush v. Lucas*, 462 U.S. 367, 388 (1983). Here, "the administrative process created by Congress provides for a comprehensive review of veterans' benefits disputes. Further, Congress has explicitly precluded judicial review of veterans' benefits disputes, which suggests that Congress' failure to create a remedy against individual VA employees was not an oversight." *Zuspann v. Brown*, 60 F.3d 1156, 1161 (5th Cir. 1995) (internal quotation marks omitted); *accord Sugrue v. Derwinski*, 26 F.3d 8, 12-13 (2d Cir. 1994).

Because we agree with the Fifth Circuit that this combination forecloses a *Bivens* action against VA employees for constitutional torts in the context of a dispute over veterans' benefits, we will affirm the district court's dismissal of these claims.

Finally, reviewing for abuse of discretion, *see Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (per curiam), we will also affirm the district court's denial of leave to amend the complaint to add a legal malpractice claim against Thomas's former legal representatives and another Privacy Act claim. *See* 265 F. Supp. 2d at 40 n.5. As the district court noted, Thomas "remains free to assert [these] claims in a new action against

the appropriate defendants." *Id.* In light of our determination that the district court has jurisdiction over Thomas's FTCA claims, however, we will remand his request to add a claim against the VA for "failure to diagnose, inform, warn, or treat," 265 F. Supp. 2d at 40 n.5. Once Thomas amends his complaint, the district court, applying *Price* and this decision, will need to decide whether section 511 bars the additional allegation.

IV.

We reverse the dismissal of counts III, V, and X, as well as the denial of Thomas's request to amend his complaint to add another tort claim, and remand for further proceedings consistent with this opinion. In all other respects, we affirm.

So ordered.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OSCAR L. THOMAS,	)	
Plaintiff,	)	
v.	)	Civil Action No. 02-1743 (ESH)
ANTHONY J. PRINCIPI, *et al.*	)	
Defendants.	)	

AMENDED MEMORANDUM OPINION

Plaintiff Oscar Thomas, a retired army veteran, has brought this *pro se* action against the Department of Veterans' Affairs ("DVA"), in which he contends that DVA diagnosed him with a form of schizophrenia, but negligently failed to inform him of that diagnosis or offer him any treatment for his ailment. Plaintiff has asserted claims under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 et seq., as well as for alleged constitutional violations under 42 U.S.C. §§ 1983 and 1985. Defendants (the DVA itself as well as a number of its officers and employees) have now moved to dismiss under FED. R. CIV. P. 12(b)(1) and 12(b)(6), or, in the alternative, for summary judgment. They argue primarily the Court lacks subject matter jurisdiction because, in essence, this is an action for suit for veterans' benefits of the sort that Congress has reserved to DVA's

exclusive and unreviewable domain. The Court agrees, and will therefore grant the motion to dismiss.

BACKGROUND

After being honorably discharged from the U.S. Army in August 1989, plaintiff filed a claim for a number of service-related mental and physical disability benefits, including one for "anxiety neurosis." In connection with this claim, he was ordered to submit to a medical treatment examination in the spring of 1991. On August 2, 1991, DVA issued its first rating decision (VA Form 21-6796b) regarding plaintiff's claim.

With respect to plaintiff's complaints about anxiety, the Department's internal report noted that "[e]xcept for auditory hallucinations, he does not seem to have any particular sign of schizophrenia, no paranoid tenancies." (Def.'s Mot. to ismiss, tab H.) However, the report continued, "the examining psychiatrist thinks that the most likely diagnosis is schizophrenia. Some of the adjunct symptoms of schizophrenia were not present, but this will be the working diagnosis for him. A definite diagnosis was not made on the VA examination." (*Id.*)[1] On this basis, the rating specialist who prepared this document neurosis had been denied, using the same language that appears in the rating decision. (Def.'s 3 Mot. to Dismiss, tab J ("Service connection is denied for anxiety neurosis because the last psychiatric examination in

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[1] This statement was apparently based on the diagnosis reached by a Dr. Kelly, who examined plaintiff on March 5, 1991. In his report, Dr. Kelly wrote that plaintiff "has persistent auditory hallucinosis which is troubling, so a diagnosis of schizophrenia probably is the most likely correct diagnosis. Some of the other adjunct symptoms of schizophrenia are not present, however, but this will be the working diagnosis for him. He has slight social and industrial disability resulting from this." (Defs.' Mot. to Dismiss, tab BB, ex. M.)

3 Mot. to Dismiss, tab J ("Service connection is denied for anxiety neurosis because the last psychiatric examination in service made no diagnosis regarding your mental state. On the VA examination, a final diagnosis was not made.").) While this notification letter was sent to plaintiff, it appears that neither the rating decision itself (the VA Form 21-6796b) nor Dr. Kelly's report was included as an attachment. (Defs.' Mot. to Dismiss at 4.) Accordingly, plaintiff apparently did not receive any documents indicating that DVA had made a "working diagnosis" of schizophrenia, although he was told that his request for benefits with respect to his mental condition had been rejected. At any rate, it seems that plaintiff did not file a formal notice of disagreement contesting the Department's denial of his claim for service-connection for his anxiety neurosis.

On November 26, 1996, however, in response to an objection lodged by plaintiff, DVA issued another rating decision, which addressed whether plaintiff had presented new and material evidence to reopen his claim for anxiety neurosis and nervous tension. This decision, which was transmitted to plaintiff on December 23, 1996, found that such evidence had not been offered, and therefore did not reopen the claim. (Defs.' Mot. to Dismiss, tab R.) DVA reached a similar result in March 1998, once again refusing to reopen plaintiff's claim for anxiety neurosis. (Defs.' Mot. to Dismiss, tab Y.) Plaintiff filed a notice of disagreement ("NOD") with this decision on September 20, 1998 (Defs.' Mot. to Dismiss, tab Z), to which DVA responded with a "Statement of the Case" on September 29 of that year. In its Statement, DVA recounted plaintiff's medical history, highlighting the statements in the August 2, 1991 report that "[n]o signs of schizophrenia were noted during examination except auditory hallucinations," but that a diagnosis "of schizophrenia was shown as most likely the correct diagnosis with slight social and industrial disability." (Defs.' Mot. to Dismiss, tab AA.) This seems to have been the first time that

plaintiff learned that DVA had made any assessment regarding his schizophrenia during his 1991 examinations.

On November 10, 1999, plaintiff filed an appeal with the Board of Veterans' Appeal ("BVA"), in which he alleged that during the previous decade (since 1991, that is), DVA had wrongfully withheld from him the fact that he had been diagnosed with schizophrenia.

Moreover, he alleged that this failure to inform him had caused him significant harm: "The diagnosis of schizophrenia with slight social and industrial disability would have, and in fact, did have a very severe impact on the veteran/appellant's ability to secure and follow a substantially gainful occupation." (Defs.' Mot. to Dismiss, tab K.) Plaintiff's internal appeal is still pending.

Plaintiff also filed an administrative tort claim against DVA on October 11, 2001, based on this same allegation.[2]

Accordingly, on August 30, 2002, plaintiff filed a complaint in this Court, in which he has mounted a number of claims against a variety of defendants associated with DVA. In essence, however, his contention here is the same as has been advanced in his administrative tort action: that DVA should be held liable under the FTCA for negligence and medical malpractice based on the DVA's failure to disclose to plaintiff in October 1991 that he had been diagnosed with some kind of

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[2] This step is required by the FTCA, which mandates that no tort claim may be brought against the United States for money damages "unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency." 28 U.S.C. § 2675(a). While there is no indication that plaintiff's administrative claim has been resolved, the FTCA provides that an agency's failure to "make a final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim." *Id.* (Defs.' Mot. to Dismiss, tabs A, BB.)

schizophrenia.[3] (Compl. ¶¶ 38, 84.) Defendants have now filed a motion under FED. R. CIV. P. 12(b)(1) and 12(b)(6), asking the Court to dismiss this case for lack of subject matter jurisdiction and for failure to state a claim.

ANALYSIS

The central issue raised by defendants' motion is whether plaintiff's tort claims are barred by 38 U.S.C. § 511. That provision reserves to the Secretary of Veterans Affairs (*i.e.*, DVA) the exclusive authority "to decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or their dependents or survivors of veterans." Moreover, all such decisions "shall be final and conclusive, and may not be reviewed by any other official or by any court." 38 U.S.C. § 511.[4]

This statute thus "precludes judicial review in Article III courts of [DVA] decisions affecting the provision of veterans' benefits," a term that includes medical services provided to veterans for disabilities incurred or aggravated in the line of duty. *Price v. United States*, 228 F.3d 420, 421

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[3] Plaintiff has also asserted a claim under the Privacy Act, in which he contends that defendants failed to keep complete and accurate records about him in connection with his various claims for service-related benefits. (Compl. ¶ 111, Pl.'s Resp. in Opp. to Defs.' Mot. to Dismiss at 5.) He has also advanced constitutional claims under 42 U.S.C. §§ 1983, 1985 (Compl. ¶¶ 15, 24), as well as additional tort claims of defamation (*id.* at ¶ 32) and fraud (*id.* at ¶¶ 68, 70, 80). For reasons set out below, these claims fail.

[4] Instead, such determinations can be reviewed only by the Board of Veterans Appeals, and from there, by the Court of Veterans Appeals and the United States Court of Appeals for the Federal Circuit. *See Beamon v. Brown*, 125 F.3d 965, 967 (6th Cir. 1998); *Larrabee v. Derwinski*, 968 F.2d 1497 (2d Cir. 1992) (reviewing history of § 511).

(D.C. Cir. 2002); *cf.* 38 C.F.R. § 20.3(e) ("Benefit means any payment, *service*, commodity, function, or status, entitlement to which is determined under laws administered by the Department of Veterans Affairs pertaining to veterans and their dependents and survivors.") (emphasis added).

In construing this provision, "courts have consistently held that a federal district court may not entertain constitutional or statutory claims whose resolution would require the court to intrude upon the VA's exclusive jurisdiction" over the allocation of veterans' benefits. *Price*, 228 F.3d at 422 (upholding dismissal of veteran's FTCA claims based on DVA's alleged bad faith failure to reimburse him for medical expenses incurred at a non-DVA hospital). Here, the gravamen of plaintiff's claim is that, having made its "working" diagnosis of schizophrenia, DVA "failed to treat or refer Plaintiff as a patient for medical treatment for Schizophrenia, PTSD, a Psyco-vegetative Syndrome and other medical conditions, causing increase in Plaintiff's psychiatric condition and other physical symptoms." (Compl. ¶ 104.) In other words, plaintiff contends that the Department failed to provide the level of care medically appropriate for the condition with which it had allegedly diagnosed him. As such, adjudicating these claims would require the Court to second-guess medical judgments made by DVA, including its decisions about how to treat the psychological problems that its physicians may have identified. Specifically, the Court would have to determine whether defendants acted properly in not referring plaintiff for further treatment after his 1991 psychological evaluation, a determination that would necessarily involve a reevaluation of DVA's factual and legal conclusion that plaintiff was not eligible for veterans' benefits (*i.e.*, hospital and medical care for his alleged schizophrenia). 7

Thus, although he attempts to disguise the fact, plaintiff's FTCA claims amount to a request that this Court review the adequacy of the medical attention provided to plaintiff.

A favorable decision as to plaintiff's claims would entail a finding that defendants should have provided a particular quantum of medical treatment to plaintiff that they did not in fact provide.

But such a finding is flatly forbidden by § 511. *See Derwinski*, 968 F.2d at 1500 (federal courts may not hear claims by veterans "seeking a particular type or level of medical care"); *In re Agent Orange Product Liability Litigation*, 818 F.2d 194, 201 n.2 (2d Cir. 1987) (claims alleging the failure of DVA to "provide adequate medical treatment . . . seek precisely the type of judicial review" forbidden by Congress); *cf. Price*, 228 F.3d at 422 ("Because a determination whether the VA acted in bad faith or with negligence would require the district court to determine first whether the VA acted properly in handling Price's request for reimbursement, judicial review is foreclosed by 38 U.S.C. § 511(a)."). It thus follows that the Court lacks subject-matter jurisdiction over plaintiff's negligence, emotional distress, and medical malpractice claims.

For similar reasons, the Court lacks jurisdiction to hear the remainder of plaintiff's claims as well. Invoking the Privacy Act, plaintiff alleges that DVA failed to maintain accurate and complete records concerning his medical condition, records necessary to the Department's "determination(s) relating to the qualifications, characters, rights, opportunities of, or benefits to the Plaintiff that was made on the basis of such record." (Compl. ¶ 111.) This claim is barred by § 511 because the injuries that allegedly resulted from defendants' failure to maintain his records all ultimately concern the adverse benefits determination made by the Department. In order to rule on the Privacy Act claim, therefore, the Court would also have to pass judgment on whether the underlying benefits decision was correct. As such, the resolution of this claim "would require the district court to determine not only that the VA intentionally failed to maintain 8 complete records, but also whether, but for the

missing records, [the claimant] should have been awarded disability benefits. This would involve a review of the prior adverse VA decision to determine whether the absent evidence affected the result and, if the court so concludes, it must then act as the Veterans Administration itself, applying benefits rules to the facts in order to determine the correct award of disability had the files been adequately maintained." *Rosen v. Walters*, 719 F.2d 1422, 1425 (9th Cir. 1983); *see also Quarles v. United States*, 731 F. Supp. 428, 431 (D. Kan. 1990) (no jurisdiction to entertain veteran's Privacy Act claim that the Veterans Administration deliberately destroyed records pertinent to his bid for disability benefits); *Castle v. United States*, 2001 WL 1602689, at *7 (N.D. Cal. Dec. 10, 2001); *Menendez v. United States*, 67 F. Supp.2d 42, 46 (D.P.R. 1999).

Plaintiff's constitutional claims are also precluded by § 511, for they too are at bottom challenges to DVA's decision not to provide veterans' benefits at the level that plaintiff desired.

For instance, plaintiff contends that defendants violated the due process and equal protection clauses by depriving him "of the proper mental, physical, emotional, health satisfaction and enjoyment of being granted and receiving needed and necessary vested veterans benefits, e.g., (medical care treatment) as other similarly situated disabled veterans." (Compl. ¶ 20.) This is little more than an attack on the specific actions taken by DVA in connection with plaintiff's application for benefits, the resolution of which would once again require the Court to pass judgment on the decisions of the Department in evaluating that application. Accordingly, the fact that these claims have been clothed in constitutional garb does not protect them from the preclusive reach of § 511. *See Cheves v. Dep't of Veterans Affairs*, 227 F. Supp.2d 1237, 1246 (M.D. Fla. 2002) (holding that § 511 interposes a bar to as-applied constitutional challenges to

DVA's processing of a claim for veterans' benefits); *Verner v. United States*, 804 F. Supp. 381, 384-85 (D.D.C. 1992).

Finally, while plaintiff's claims for defamation and fraud may not be barred by § 511, they are barred on sovereign immunity grounds, as the FTCA, which contains the only waiver of sovereign immunity applicable here, specifically excludes such claims from the category of those that may be asserted against the federal government. *See* 28 U.S.C. § 2680(h) (providing that the FTCA does not apply to claims "arising out of . . . libel, slander, misrepresentation, [and] deceit"); *accord In re Orthopedic Bone Screw Litigation*, 264 F.3d 344, 363 (7th Cir. 2001) (holding that common law intentional fraud claim cannot be maintained under the FTCA). These claims too must therefore be dismissed.[5]

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[5] Plaintiff has also filed a Motion for Leave to File an Amended Complaint. With this motion, he seeks to add three more claims: (1) a Privacy Act claim against the Assistant United States Attorney handling this case for disclosing plaintiff's medical records as part of defendants' motion to dismiss; (2) a claim for failure to diagnose, inform, warn, or treat against DVA based on its handling of plaintiff's medical care from 1991 forward; (3) a claim for legal malpractice against the Disabled American Veterans and the Non-Commissioned Officers Association (plaintiff's one-time legal representatives) for failing to provide him with documents alluding to his alleged 1991 schizophrenia diagnosis.

As to the first claim, given the identity of the proposed defendant, the Court believes that allowing such an amendment in the context of the pending action would unduly prejudice the government. *See Childers v. Mineta*, 205 F.R.D. 29, 31 (D.D.C. 2001) ("The court may also deny leave to amend the complaint if amending would cause the opposing party undue prejudice."). Plaintiff's second proposed claim essentially repeats the malpractice claims the Court has determined in this Memorandum Opinion are barred by § 511. As such, providing leave to amend would be futile because this new claim could not survive a motion to dismiss. *See Robinson v. Detroit News, Inc.*, 211 F. Supp. 2d 101, 114 (D.D.C. 2002). Finally, the third claim is largely unrelated to plaintiff's original cause of action, and would significantly alter the theory of the case from one about medical decisions by DVA to one about legal decisions made by the advocacy groups which represented plaintiff while his benefits claims was pending. *See Mississippi Ass'n of Cooperatives v. Farmers Home*

CONCLUSION

For the reasons given above, defendants' motion to dismiss for lack of subject matter jurisdiction is granted, and this case shall be dismissed with prejudice.

ELLEN SEGAL HUVELLE
United States District Judge

DATE: May 28, 2003

Admin., 139 F.R.D. 542, 543-44 (D.D.C. 1992) (denying motion for leave to amend where amendment "would radically alter the scope and nature of the case and bears no more than a tangential relationship to the original action").

For these reasons, plaintiff's motion will be denied, although he remains free to assert the first and third claims in a new action against the appropriate defendants.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OSCAR THOMAS,	)	
	)	
Plaintiff	)	
	)	Civil Action No. 02-1743
	)	(AK)
v.	)	
	)	
R. JAMES NICHOLSON,	)	
et al.	)	
	)	
Defendants.	)	
	)	

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS JOHN DOES 1, 2, AND 3 AS DEFENDANTS IN THIS ACTION AND RENEWED MOTION FOR SANCTION

Come Now the Plaintiff with Opposition to Defendant R. James Nicholson, *et al.*, [111] Motion to Dismiss the three "John Doe" defendants listed in the caption of Plaintiff's First Amended Complaint from this action, pursuant to Federal Rules of Civil Procedure 4(m) and 12(b)(4), due to defective service of process.

Defendants' contend that Plaintiff's First Amended Complaint lists three "John Doe(s)" as defendants, but does not provide the names of those individuals. *See* Dkt. Entry 51; because, "Plaintiff has submitted no evidence that those "John Doe(s)" have been served with a copy of the summons or complaint. Accordingly, they say, the Court should dismiss

Plaintiff's claims against those defendants, leaving only the Secretary of the Department of Veterans Affairs and the United States as Defendants in this action."

They allege, "to bring a claim against a federal officer or employee, a plaintiff must serve that individual with a copy of the complaint and summons. *See* Fed. R. Civ. P. 4(i)(1)(B). That cannot occur unless the defendant has been named. *See, e.g., Brown v. Wachovia Bank*, No. 06-0153, 2007 WL 1378491, at *5 n.7 (D.D.C. May 10, 2007) (dismissing "John Doe" defendants "because they cannot effectively be served in order to confer jurisdiction over them in this Court"); *M.K. v. Tenet*, 99 F. Supp. 2d 12, 18 (D.D.C. 2000). Service must occur within 120 days after the complaint is filed, unless plaintiff shows "good cause" and the Court extends the time for service. *See* Fed. R. Civ. P. 4(m), and that Plaintiff has not complied with Rule 4(m), and that "The record shows no evidence that any individual employees have been served. That is unsurprising, given that Plaintiff has not amended his complaint to specifically name the "John Doe" defendants. *See Brown*, 2007 WL 1378491, at *5 n.7 (noting that effective service cannot be made upon John Doe defendants). Defendants' contends that "The time for service has long since expired. *See* Fed. R. Civ. P. 4(m) (requiring that defendants be served within 120 days after the filing of the complaint). They say that, "Although courts occasionally extend that service period for a plaintiff that cannot identify the John Doe defendants absent discovery", but, that "the discovery period in this action ended several months ago. *See M.K.*, 99 F. Supp. 2d at 17-19.

Accordingly, there is no reason to extend the time for service to permit Plaintiff to serve individual federal employees at this late stage, and the John Doe defendants should be dismissed from this action. *See* Fed. R. Civ. P. 4(m); *Brown, M.K.*, 99 F. Supp. 2d at 18."

The conclude by "respectfully requesting that the Court GRANT them motions to dismiss John Does 1, 2, and 3 as Defendants in this action.

Plaintiff opposes Defendants' Motion to Dismiss, and for the following reasons stated in the attached supporting Memorandum of Points and Authorities in opposition below, the Court should deny Defendants' Motion to Dismiss.

Respectfully Submitted,

_____/s/_____

May 29, 2007

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS JOHN DOES 1, 2, AND 3 AS DEFENDANTS IN THIS ACTION AND RENEWED MOTION FOR SANCRION

I. INTRODUCTION

Plaintiff Opposes Defendants' Motion to Dismiss and Requests even stiffer Sanctions are levied.

On August 30, 2002, Plaintiff file and Original Complaint in this United States District Court [Docket # 1] On January 27, 2003, United States, through its Justice Department Attorney, purporting to represent some of the named federal-employee-defendants', served its Answer, purporting to be answering on behalf of a number of them, however the United States Attorney General, nor his designee, never moved to issue certifications - certifying that each federal employee-defendant named in the lawsuit was acting within the scope of their employment at the time of the incident giving rise to the incident causing injury, and never obtained court-ordered substitutions, substituting the United States as the "Defendant" in "each" of their places. Thus, [The United States is not a proper defendant in this case under the FTCA framework]; [See 28 U.S.C. § 2679(1) and (2). *See* OSBORN v. HALEY (No. 05-593) 422 F. 3d 359, affirmed, 127 S. Ct. 881, 901 (Jan 22, 2007)], and since the scope of employment certifications defines this Court's subject-matter jurisdiction, this Court never had jurisdiction to adjudication Plaintiff's claims under the FTCA framework; making all of the time, work effort, filings, fees and costs generated since the United States' filing of its answer completely unnecessary," now -making sanctions more appropriate than ever.

Equally unnecessary, on March 28, 2003, the United States, who was not a proper defendant, purporting to represent itself and each the named employee-defendants, moved to dismiss, or in the alternative, for summary judgment, on the erroneous grounds of a lack of subject-matter jurisdictions, when in fact, the district court was required to retain supplemental jurisdiction under 28 U.S.C. § 1367 and adjudicate Plaintiff's claims under District of Columbia (state-law); again, making all of the time, work effort, filings, fees and costs that has been generated since the United States' filing of its answer completely unnecessary," now -making sanctions appropriate.

On May 2, 2003, plaintiffs filed and served opposition memorandum and exhibits, [Court Docket [29] and [30], wherein, Plaintiff sought cross motions for summary judgment.

Although, Plaintiff's opposition and cross motions for partial summary judgment raised the issues of [lack of certifications and substitutions], they were disregarded, dismissed and/or denied as moot.

On a "de novo" review of Plaintiff's case by the United States District Court for the District of Columbia Circuit, this decision was affirm in part, reversed in part, and remanded. The DC Circuit did not address the certification/substitution issue, but ordered that Plaintiff could ADD another tort claim based on the VA's failure to inform, warn, or treat.

On January 5, 2006, Plaintiff filed Motion to File Amended Complaint against all defendants [51]. On 03/01/2006, this Court approved Motion to File Amended Complaint.

Defendants' attempt to disregard that Plaintiff named:

1. In the Original Complainant:

Anthony J, Principi, now R. James Nicholson, et al., G. J. White, M. Corbin; Douglas A. Wallin; A. Butler; J. Jensen; C. Faye Norred; Sandra Mize; Dr. G. Thomas 6 Yungman; Lona (Shannon) Shipley; Lucille Dunlap; V.L. Knott; L. Harvey; Iris Hirst; A. Vangordon; Thomas Wayburn, and A. R. Kelly.

2. In the First Amended Complaint:

James D. Nicholson, et al, [which also includes defendants in 1 above]; Nancy J. Keesee; Rowland A. Christian; Director, DVA; Ms. Payne; Neil S. Richman; Diane Fuller; Elizabeth Biniakewitz; Karen A. Curd; Sonya A. Harris; Samuel A. Herring; Nancy J. Keesee; A.R. Kelly; Mary Koller; Lawrence E. Madlock; Ajit Pillai; Jeffrey L. Todd; James B. Wood; Paul. G. Thomson, John Doe I, II, and III, and; The United States of America.

On 04/05/2006, [59], the United States, still purporting to be a proper defendant and representing the named employee-defendants', filed its Answer, but, again, the United States Attorney General, nor his designee, never issued certifications - certifying that each federal employee-defendant named in the lawsuit was acting within the scope of his or her office or employment at the time of the incident giving rise to the incident-causing injury, and never obtained court-ordered substitutions, substituting the United States as "Defendant" in "each" of their places' [See 28 U.S.C. § 2679(1) and (2). *See* OSBORN v. HALEY (No. 05-593) 422 F. 3d 359, affirmed, 127 S. Ct. 881, 901 (Jan 22, 2007). Thus, the United States is not a proper defendant and this Court lacks subject-matter jurisdiction over Plaintiff's FTCA claims under the FTCA framework and should adjudicate them under state law. 28 U.S.C. § 1367. Issuance of scope of employment certifications is and was a condition precedent to the

continued prosecution of this suit" under the FTCA framework).

As said certifications were not issued in this case, the Court must find that it does not have subject matter jurisdiction under the FTCA framework, and must adjudicate Plaintiff's claims in accordance with state law; and Plaintiff demands, if this case goes to trial, a jury.

Absent certification, § 2679(d)(3) directs that the case must be remanded to the state court in which the action commenced; which in effect means, the district court lacked jurisdiction, but since this case originated in federal district court, absent the certification, the case remains and is to be adjudicated under state law. 28 U.S.C. 1367. A forum to adjudicate the case has already been established. 7

Nonetheless, subsequently, on September 3, 2006, after pleadings were closed, Plaintiff renewed the Cross-Motion (Court Docket # [69], [70], [71] and [72]. Neither the United State nor its counsel, purporting to represent itself or any of the named employee-defendants', moves to file a response to Plaintiff's motion, or to seek any extension of time to file the response. Defendants' "responded", answering the First Amended Complaint raising all of its defenses without raising the defense of insufficiency of service or process.

On September 18, 2006, by Minute order, this Court struck Docket [71] and [72], but not the motion itself [69]. [*See* Court's Minute Order, Court Docket # [73]. Currently pending before the Court is Plaintiff's initial motion for leave to file [76[, [Docket # [72] that had been stricken from the record, was denied by the Court's Minute Order [81], and Plaintiff's motion for reconsideration of the Court's denial of the motion and Plaintiff's two subsequent motions for further reconsideration of the denial of the initial motion, [Court

Docket # [76], [82] and [92]], and Defendants' subsequent response to them [110].

Because of the initial problems in filing [Court Docket # [69] and its Attachments via ECF, and knowing that the Attachments were not completely filed via the ECF, which then were also filed by Generic Mail Box. When the Court struck [Docket # 71 and 72, this created the confusion as to whether [Docket # 69] had been completely filed with all of its attachments. This being unclear, Plaintiff moved by motion [76] for clarification and Motion for Leave to re file the stricken documents, the motion was denied [81]. Plaintiff then filed [82] - a Second Motion for Further Reconsideration of the Magistrate Judge's Order, the motion was denied by Minute Order date 12/05/2006. 8

On 12/14/2006, in response to the Magistrate Judge's Order 12/05/2006 Minute Order of denial, Plaintiff filed [92] seeking, among other relief, Motion for Reconsideration of [76] and [82] and Further Reconsideration, Motion for Leave to File an Amended Complaint, and in the Alternative, for the Court to Grant a Stay of all Proceedings. That motion was never timely responded to by the Defendants and thus, and never acted on by the Court and is still pending.

Defendants' finally responded to the motion [92], way out of time and after a length retroactive Court extension on May 23, 2007, [Docket # 110].

Defendants JOHN DOE 1, 2 and 3 are individuals whose identity at the relevant time was not then currently known by the Plaintiffs. Upon information and belief, they are employees of either the Department of Veterans Affairs, VA Medical-Memphis, TN, and/or acted as agents of either defendant Secretary, DVA or defendant United States or both of them. They are sued in their individual and official capacities. Plaintiff has timely and properly served copies of the Original and Amended Complaints and Summons on them by timely serving R. James

Nicholson in his individual and official capacity, and upon the United States. Plaintiff had named and served this way out of an abundance of caution, because, the Appellate Court had ruled when this case was on appeal - that Plaintiff, in essence, could not sue a federal employee in this case under the FTCA, Bivens, or the FOIA/Privacy Act, because, that Court, as Plaintiff, had been disregarded on the certifications and substitutions issues - that is and was required to define this Court's subject-matter jurisdiction, that absent the certifications and substitutions, this Court never had.
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Therefore, except for the correct identity of Defendants' John Doe 1, 2 and 3, the United States had actual, definitive, and constructive knowledge - and notice - of the ensuing litigation and its content. The relevant information needed to positive identify John Doe 1, 2, and 3 never reached Plaintiff because Defendant, when asked for this information, balked and refused, and sought and received a Protective Order [89] contending that, in effect, "these individuals were not party's to the lawsuit."

Defendants' are calling for dismissal of John 1, 2 and 3 from the First Amended Complaint but have no justifiable legal grounds, because for one, they never filed any timely opposition to Plaintiff's Motion for Leave to Amend until way out of time, causing unnecessary delay, obstruction, and prejudice in Plaintiff's moving to Amend - their delay in responding surely cause unnecessary administration and delay of the Court's own decision, which is until now, not yet rendered. Defendants' concedes they never moved for an extension of the deadline for filing a response to Plaintiff [Docket # 92] Motion for Leave by having requested unjustifiable extension, out of time to response since December 14, 2006, and only recently responded on May 23, 2007. See [Docket #'s 103, 98, 107 and 110].

So, because, at the time Plaintiff filed the First Amended Complaint, Plaintiff did not know the names or identities of the John Doe employee-defendants, except that they were likely federal employees of the DVA, Plaintiff eventually needed to obtain this information from Defendants' DVA and the United States through discovery, who Plaintiff had already
properly named and served without names.

However, Defendants' delayed and balked on discovery, and once additional discovery disputes arose and the Court issued Defendants' a Protective Order, it became necessary and clear for Plaintiff's to seek 10 a further extension of time for leave to file a Second Amended Complaint, [92] to try to obtain John Doe 1, 2 and 3's correct identity information. Also, because of the Defendants' own direct (dilatoriness and 'game playing'), e.g., (delaying actions and omissions), preventing and delaying Plaintiff from being able to obtain the needed and necessary information to seek leave of the Court and to file a Second Amended Complaint, Defendants' cannot now be permitted to treat a scheduling order as a "frivolous piece of paper idly entered, which can be cavalierly disregarded without peril."

So, "due to circumstances not within [Plaintiff's] control . . . the Motion for Leave to file an Amended Complaint was unable to be filed before the original scheduling order deadline - or by the court-ordered extension deadline, and therefore, on 11/21/2006, [Docket # 90], scheduling order sets the deadlines for subsequent proceedings in the litigation, including amending the pleadings. The Scheduling Order was not entered until September 18, 2006.

The Court's Scheduling Order issued on September 18, 2006 stated: Disclosures in accordance with 26(a)(1) of the Federal Rules of Civil Procedure shall be made by not later than 10/18/2006; Discovery due by 1/18/2007;

pleadings may be amended only with leave of the court; any motion for leave to amend shall be filed by no later than 11/22/2006; Dipositive Motions due 2/22/2007. The Scheduling Order gave no deadlines for filing responsive motion and replies. 11

Therefore, for the purpose of preserving Plaintiff's interest in this lawsuit, Plaintiff has now moves again on February 22, 2007 and filed a Second "dispositive" Renewed Cross-Motion for Partial Summary Judgment on the issue of liability with a Second Supplemental Memorandum in Support thereof [96], and also subsequently filed and have pending, Plaintiff's Motion for Judgment on the Pleadings, [94][1], and Plaintiff's Motion for Sanction [95]. Plus, Defendants' Motion to Dismiss comes too late, as the Scheduling Order deadline for filing [any other dipositivè motion] has expired, e.g., (for filing, without leave of the Court - ANY OTHER DISPOSITIVE MOTION - other than "Defendants' Cross- Motion for Summary Judgment, approved by the - still further 05/23/2007 extension of time - wherein - they are given until June 12, 2007 to file their "Cross-motion for Summary Judgment" - *See* Court Minute Order of 05/23/2007.

Thus, Defendants' Motion to Dismiss is not authorized, and is null and void. (The court of appeals reversed on the razor-sharp ground that the district court

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1 Federal Rule of Civil Procedure 12(c) provides that either party can file a motion for judgment on the pleadings after the pleadings are closed. Such motions are subject to the same standard as those that are filed pursuant to Rule 12(b). See *Robinson v. D.C.*, 403 F. Supp. 2d 39, 47 (D.D.C. 2005). A plaintiff seeking judgment on the pleadings is essentially saying that, as a matter of law, and without looking beyond the pleadings, he or she is entitled to judgment on a particular claim. See id. (citing EEOC v. St. Francis Xavier Parochial Sch., 117 F.3d 621, 624 (D.C. Cir. 1997)).

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abused its discretion in accepting (and ruling upon) a dispositive motion after the scheduling order deadline expired). (Like the plaintiff, the employer coincidentally waited 16 months past the deadline to file its third dispositive motion. The district court was required (*per* Fed. R. Civ. P. 6(b)) to find "excusable neglect" to allow the late filing, but the defendant apparently never bothered to offer a *mea culpa* (or, indeed, even to move for leave to file a belated motion).

Service Under F.R.C.P., Rule 4(m)

Rule 4(m) of the Federal Rules of Civil Procedure places a time limit on service of process. It states that:

> "If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.

FED. R. CIV. P. 4(m)."

Because Plaintiff has shown herein that good cause exist why service was unable to be effected - upon Defendants in their correct name rather than in their John Doe 1, 2, and 3 in their correct name within 120 days, [Plaintiff did service in their official capacity through and by properly serving the United States], the Court should, upon considering the aforementioned filings, facts and circumstances, the entirety of Plaintiff's

Complaint, the history of the case, and the relevant statutes and case law, the Court should, for all of the foregoing reasons, (1) GRANT Plaintiff's Motions for Reconsideration of the Court's December 5, 2006, and October 20, 2006 Minute Orders and the Court's September 18, 2006 Scheduling Order, and the relief requested therein. And, as already requested in Plaintiff's Reply to Defendants' Opposition to Plaintiff Motion of December 14, 2006, that the Court should (2) STAY any Order or ruling on Plaintiff's Request for Leave to File another Amended complaint, and (3) STAY the requested period of discovery, until after ruling and notice on the Plaintiff's Renewed and Second Renewed Cross-Motion(s) for Partial Summary Judgment; Plaintiff's Motions for Judgment on the Pleadings, and Plaintiff's Motion 13 for Sanctions [Docket #'s 94, 95 and 96]; and Defendants' Response thereto; and Defendants' Cross-Motion for Summary Judgment and Plaintiff's Response thereto.

The question, then, is whether good cause exists to extend the usual 120-day deadline for service under Rule 4(m) of the Federal Rules of Civil Procedure. The Court has broad discretion under Rule 4(m) to extend the time for service. See FED. R. CIV. P. 4 advisory committee's note, 1993 Amendments, subdivision (m) (Rule 4(m) "authorizes thecourt to relieve a plaintiff of the consequences of an application of this subdivision even if there is no good cause shown.").

In light of the United States', [who is not a proper Defendant in this case under the FTCA framework], Defendants' initial motion for extension to time to file an answer or otherwise respond [56], which once granted resulted in the first responsive pleading being filed within the 120 days for service had elapsed, and the two motions for extension of time to respond to discovery and for Protective Order [89] and [90], and the three motions for

additional extension; (1) Motion for Leave to File Motion for Extension of Time, (2) the Attached Motion for Extension of Time, and (3) the subsequent Motion for Extension of Time to File Cross-Motion for Summary Judgment and to file response to Plaintiff to Plaintiff's Motions and Dispositive Motions, which again, once granted, and they were, resulted in the several additional responsive pleading being filed after the 120 days for service had elapsed, wherein, in none of them did the United States and the named Defendants' named in the Original and First Amended Complaint, and those additional defendants' "John Doe's 1, 2, and 3's" - [attempting to be named by Plaintiff], raise the defense of defective service of process and therefore, have failed - waive it. In order to 14 reach the merits of this case on John Doe's 1, 2, and 3, the Court should retroactively extend Plaintiff's time for service on John Doe 1, 2, and 3 and deem the Defendants' responsive pleadings -without raising the defense of "defective service of process" - as a waiver and as actual service; since the Plaintiff has now actually named John Doe 1, 2, and 3 and others in a prior motions and responsive pleadings - giving notice of the correct naming of these John Doe's to the already-named Defendant's, the United States and to the Court - saving any prejudice whatsoever to the United States and the Defendants' - their having already filed responses to some of these motions and pleadings; for example, [Docket # 100] responding to [Docket #'s 82 and 92]....service sufficient under Rule 4(i) (1)(A)(B); under Rule 4(i)(2)(A) and (B); and (3); and under Rule 4(m) of the Federal Rules of Civil Procedure.

Under § (3) of this Rule: The court shall allow a reasonable time to serve process under Rule 4(i) for the purpose of curing the failure to serve:

(A) all persons required to be served in an action governed by Rule 4(i)(2)(A), if the plaintiff has served

either the United States attorney or the Attorney General of the United States, or

(B) the United States in an action governed by Rule 4(i)(2)(B), if the plaintiff has served an officer or employee of the United States sued in an individual capacity.

JUDICIAL NOTICE

Plaintiff asks and requests the Court take Judicial Notice of the following facts:

1) "that the United States and the named employee-defendants are, which can be seen through their filing actions, trying to create a situation, through which their court filing, have Plaintiff file an Amended Complaint so United States and the Defendants' can have a third bite of the Apple to file the scope of employment certifications it previously lacked filing."

2) "that there is written evidence that the named employee-defendants' and the United States have consulted in writing with Plaintiff seeking Plaintiff's position and concurrence on the United States moving to issue certifications and substitutions of the United States in place of the named employee-defendants." 15

II. CONCLUSION

Therefore, for all of the reasons stated herein and elsewhere, considering all the relevant facts and circumstance, to include the raised jurisdictional question that points out the United States' failures to issue scope of employment certifications and to obtain United States' substitutions in place of the named employee-defendant and their legal posture in both the Original and First

Amended Complaint from and sent the outset, the Defendants' Motion to Dismiss should be denied, and the Court should assess very serious, harsh and extreme monetary and other sanctions against the United State and all named employee-defendants' in favor of Plaintiff for its outrageous legal and judicial misconduct; and also because, and since the scope of employment certifications defines this Court's subject-matter jurisdiction, this Court never had jurisdiction to adjudication Plaintiff's claims under the FTCA framework; made all of the time, work effort, filings, fees and costs and grave generated since the United States' filing of its original answer [11] and second answer [56] and [59] completely unnecessary," making sanctions now more appropriate than ever.

Respectfully Submitted,

_____/s/_____

May 29, 2007

Oscar L. Thomas
Plaintiff, Pro Se
CMR 454, Box 1746
APO AE 09250
Tel of Fax: 011-49-981-12912
E-mail: thomas.ol@an-netz.de

CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2007, I caused a copy of the foregoing Memorandum in Opposition to Defendants' **Motion to Dismiss John Doe 1, 2, and 3 as 16 Defendants, and Motion for Renewed Sanctions** to be filed and served upon plaintiff via the Court's Electronic Case Filing System or, should I receive notice that electronic service upon Defendants' was unsuccessful, by first class mail, postage prepaid, addressed to:

ROBIN M. MERIWEATHER, D.C. Bar. # 490114
Assistant United States Attorney
555 Fourth Street N.W.
Washington, D.C. 20530
Phone: (202) 514-7198
Fax: (202) 514-8780
Robin.Meriweather2@usdoj.gov

VA examination August 2, 1991 indicated history of hearing voices in his head, which began when to stressed from double duty as recruiting sergeant. The veteran indicated he had treatments with Valium and other psychiatric medications. No signs of Schizophrenia were noted during the examination except auditory hallucinations. No paranoid tendencies were noted. Proverb interpretation was abstract. Cognitive functions and judgment were good. Diagnosis of Schizophrenia was shown most likely the correct diagnosis with slight social and industrial disability.

No medical evidence was submitted to establish a relationship between the complaints noted in service and the diagnosis of Schizophrenia shown two years post discharge. Diagnosis in service was shown as personality disorder.

No clear and unmistakable error under the provisions of 38 CFR 3.105(a) has been established in rating decision dated August 2, 1991 in not establishing service connection for chronic psychiatric abnormality to include anxiety neurosis.

The rule regarding benefit of reasonable doubt does not apply because the preponderance of evidence is unfavorable.

PREPARED BY: _____

A. Butler DRO "OMAS 1772 SOC

DEPARTMENT OF VETERANS AFFAIRS
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August 26, 2002

Mr. Oscar L. Thomas
CMR 454, Box 1746
APO AE 09250

Subject: Administrative Claim

Dear Mr. Thomas:

We have completed out investigation of your administrative tort claim dated October 11, 2001, as amended by your letter dated November 1, 2001, and your administrative claim dated November 14, 2001, both of which are for personal injury as an alleged result of the actions of employees of the U.S. Department of Veterans Affairs (VA) in determining your entitlement to veterans disability benefits. Please not that your letter to our office of March 6, 2002, in which you applied for VA benefits under 38 U.S.C. § 1151, has been forwarded to the Washington Regional Office for their review and

appropriate action, as they have jurisdiction over such applications.

Under the Federal Tort Act (FTCA), VA is responsible for any negligent of wrongful acts or omissions by VA employees acting within the scope of their employment which has caused death, personal injury, and/or property damage. After reviewing our files and the material you submitted in light of the issues you raised in your claims, we have found no such negligent or wrongful acts or omissions. Moreover, determinations regarding veteran's benefits are not reviewable under the FTCA. See Title 38, United States Code, Section 511(a). Accordingly, your claims are hereby respectfully denied.

If you are dissatisfied with this decision, you may file a request for reconsideration of your claims with the VA General Counsel by any of the following means: (1) you may mail your request to the Department of Veterans Affairs, General Counsel (021B), 810 Vermont Avenue, N.W., Washington, DC 20420; (2) you may file you request by data facsimile (fax) to (202) 273-6385; or (3) you may e-mail your request to OGC.torts@mail.va.gov. To be timely filed, VA must receive this request prior to the expiration of 6 months from the date of the mailing of this final denial. Upon filing such a request for reconsideration, VA shall have 6 months from the date of that filing in which to make final disposition of the claims, and your option to file suit in an appropriate U.S. District Court under 28 U.S.C. 2675(a) shall not accrue until 6 months after the filing of such request for reconsideration (28 C.F.R. Section 14.9).

In the alternative, if you are dissatisfied with the action taken on your claims, you may file suit in accordance with the Federal Tort Claims Act, sections 1346(b) and 2671-2680, Title 28, United States Code, which provides that a tort claim that is administratively denied may be presented to a Federal district court for

judicial consideration. Such a suit must be initiated within 6 month after the date of the mailing of this notice of final denial as as shown by the date of this letter (section 2401(b), title 28, United States Code). If you do initiat such a suit, you further advised that the proper defendant is the United States, not VA.

Sincerely

_____-s_____
MICHAEL R. HOGAN
Assistant Regional Counsel

Article III, U.S. Constitution

Section 1. The judicial power of the United States, shall be vested in tne Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Section 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;–to all cases affecting ambassadors, other public ministers and consuls;–to all cases of admiralty and maritime jurisdiction;–to controversies to which the United States shall be a party;–to controversies between two or more states;- between a state and citizens of another state;–between citizens of different states;–between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at

such place or places as the Congress may by law have directed.

Section 3. Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

The Veterans' Judicial Review Act (VJRA) of 1988 38 U.S.C, § 511(a), which states:

The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. The decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise. 38 U.S.C. § 511(a)

TITLE 28–JUDICIARY AND JUDICIAL PROCEDURE PART IV–JURISDICTION AND VENUE CHAPTER 85–DISTRICT COURTS; JURISDICTION Sec. 1331. Federal question

28 U.S.C. § 1331, states:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States. (June 25, 1948, ch. 646, 62 Stat. 930; Pub. L. 85-554, Sec. 1, July 25, 1958, 72 Stat. 415; Pub. L. 94-574, Sec. 2, Oct. 21, 1976, 90 Stat. 2721; Pub. L. 96-486, Sec. 2(a), Dec. 1, 1980, 94 Stat. 2369.) Historical and Revision Notes Based on title 28, U.S.C., 1940 ed., Sec. 41(1) (Mar. 3, 1911, ch. 231, Sec. 24, par. 1, 36 Stat. 1091; May 14, 1934, ch. 283, Sec. 1, 48 Stat. 775; Aug. 21, 1937, ch. 726, Sec. 1, 50 Stat. 738; Apr. 20, 1940, ch. 117, 54 Stat. 143). Jurisdiction of federal questions arising under other sections of this chapter is not dependent upon the amount in controversy. (See annotations under former section 41 of title 28, U.S.C.A., and 35 C.J.S., p. 833 et seq., Secs. 30-43. See, also, reviser's note under section 1332 of this title.) Words ``wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs," were added to conform to rulings of the Supreme Court. See construction of provision relating to jurisdictional amount requirement in cases involving a Federal question in United States v. Sayward, 16 S.Ct. 371, 160 U.S. 493, 40 L.Ed. 508; Fishback v. Western Union [[Page 331]] Tel. Co., 16 S.Ct. 506, 161 U.S. 96, 40 L.Ed. 630; and Halt v. Indiana Manufacturing Co., 1900, 20 S.Ct. 272, 176 U.S. 68, 44 L.Ed. 374. Words ``all civil actions" were substituted for ``all suits of a civil nature, at common law or in equity" to conform with Rule 2 of the Federal Rules

of Civil Procedure. Words ``or treaties" were substituted for ``or treaties made, or which shall be made under their authority," for purposes of brevity. The remaining provisions of section 41(1) of title 28, U.S.C., 1940 ed., are incorporated in sections 1332, 1341, 1342, 1345, 1354, and 1359 of this title. Changes were made in arrangement and phraseology. Amendments 1980–Pub. L. 96-486 struck out ``; amount in controversy; costs" in section catchline, struck out minimum amount in controversy requirement of $10,000 for original jurisdiction in federal question cases which necessitated striking the exception to such required minimum amount that authorized original jurisdiction in actions brought against the United States, any agency thereof, or any officer or employee thereof in an official capacity, struck out provision authorizing the district court except where express provision therefore was made in a federal statute to deny costs to a plaintiff and in fact impose such costs upon such plaintiff where plaintiff was adjudged to be entitled to recover less than the required amount in controversy, computed without regard to set-off or counterclaim and exclusive of interests and costs, and struck out existing subsection designations. 1976–Subsec. (a). Pub. L. 94-574 struck out $10,000 jurisdictional amount where action is brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity. 1958–Pub. L. 85-554 included costs in section catchline, designated existing provisions as subsec. (a), substituted ``$10,000" for ``$3,000", and added subsec. (b). Effective Date of 1980 Amendment; Applicability Section 4 of Pub. L. 96-486 provided: ``This Act [amending this section and section 2072 of Title 15, Commerce and Trade, and enacting provisions set out as a note under section 1 of this title] shall apply to any civil action pending on the date of enactment of this Act [Dec. 1, 1980]." Effective Date of 1958 Amendment Section 3 of Pub. L. 85-554 provided

that: ``This Act [amending this section and sections 1332 and 1345 of this title] shall apply only in the case of actions commenced after the date of the enactment of this Act [July 25, 1958]."

28 U.S.C. § 1346(b)(1), states:

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. 28 U.S.C. §§ 2671-2680

TITLE 28–JUDICIARY AND JUDICIAL PROCEDURE PART IV–JURISDICTION AND VENUE CHAPTER 87–DISTRICT COURTS; VENUE Sec. 1402.

28 U.S.C. § 1402(b), states:

United States as defendant (a) Any civil action in a district court against the United States under subsection (a) of section 1346 of this title may be prosecuted only: (1) Except as provided in paragraph (2), in the judicial district where the plaintiff resides; (2) In the case of a civil action by a corporation under paragraph (1) of subsection (a) of section 1346, in the judicial district in which is located the principal place of business or principal office or agency of the corporation; or if it has no principal place of business or principal office or agency in any judicial district (A) in the judicial district in which is located the office to which was made the return of the tax in respect of which the claim is made, or (B) if no return was made, in the judicial district in which lies the District of Columbia. Notwithstanding the foregoing provisions of this paragraph a district court, for the convenience of the parties and witnesses, in the interest of justice, may transfer any such action to any other district or division. (b) Any civil action on a tort claim against the United States under subsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred. (c) Any civil action against the United States under subsection (e) of section 1346 of this title may be prosecuted only in the judicial district where the property is situated at the time of levy, or if no levy is made, in the judicial district in which the event occurred which gave rise to the cause of action. (d) Any civil action under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the

United States shall be brought in the district court of the district where the property is located or, if located in different districts, in any of such districts. (June 25, 1948, ch. 646, 62 Stat. 937; Pub. L. 85-920, Sept. 2, 1958, 72 Stat. 1770; Pub. L. 89-719, title II, Sec. 202(b), Nov. 2, 1966, 80 Stat. 1149; Pub. L. 92-562, Sec. 2, Oct. 25, 1972, 86 Stat. 1176; Pub. L. 97-164, title I, Sec. 131, Apr. 2, 1982, 96 Stat. 39.) Historical and Revision Notes Based on title 28, U.S.C., 1940 ed., Secs. 762, 931(a) (Mar. 3, 1887, ch. 359, Sec. 5, 24 Stat. 506; Aug. 2, 1946, ch. 753, Sec. 410(a), 60 Stat. 843). Section consolidates the venue provisions of section 762 of title 28, U.S.C., 1940 ed., with the venue provisions of section 931(a) of such title, the latter provisions relating to tort claims cases. The jurisdictional provisions of such section 931(a) are incorporated in section 1346(b) of this title. For other provisions thereof, see Distribution Table. Provisions of section 762 of title 28, U.S.C., 1940 ed., relating to the verification and contents of a petition filed against the United States were omitted as unnecessary. Section 265 of title 28, U.S.C., 1940 ed., relative to the petition in cases filed in the Court of Claims was also omitted from the revised title. (See, also, Rule 11 of the Federal Rules of Civil Procedure.) Words ``civil action'' were substituted for ``suit'' in view of Rule 2 of the Federal Rules of Civil Procedure. Changes were made in phraseology. Amendments 1982–Subsec. (a). Pub. L. 97-164 inserted ``in a district court'' after ``civil action'' in introductory provisions preceding par. (1). The phrase ``civil action'' also appeared in par. (2), but no change was made to reflect the probable intent of Congress as indicated on page 79 of House Report No. 97-312. 1972–Subsec. (d). Pub. L. 92-562 added subsec. (d). 1966–Subsec. (c). Pub. L. 89-719 added subsec. (c). 1958–Subsec. (a). Pub. L. 85-920 provided for venue and change of venue in tax refund suits by corporation. Effective Date

of 1982 Amendment Amendment by Pub. L. 97-164 effective Oct. 1, 1982, see section 402 of Pub. L. 97-164, set out as a note under section 171 of this title. Effective Date of 1966 Amendment Amendment by Pub. L. 89-719 applicable after Nov. 2, 1966, see section 203 of Pub. L. 89-719, set out as a note under section 1346 of this title. Section Referred to in Other Sections This section is referred to in title 26 section 7429.

28 U.S.C. § 2401(b), states:

A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. ch. 171 - Tort Claims Procedure, (28 U.S.C. §§ 2671-2680), states:

28 U.S.C. § 2671 - Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States. "Employee of the government" includes (1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 115, 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation, and (2) any officer or employee of a Federal public defender organization, except when such officer or employee performs professional services in the course of providing representation under section 3006A of title 18.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

28 U.S.C. § 2672 - Administrative adjustment of claims

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney

General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: *Provided*, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee. Notwithstanding the proviso contained in the preceding sentence, any award, compromise, or settlement may be effected without the prior written approval of the Attorney General or his or her designee, to the extent that the Attorney General delegates to the head of the agency the authority to make such award, compromise, or settlement. Such delegations may not exceed the authority delegated by the Attorney General to the United States attorneys to settle claims for money damages against the United States. Each Federal agency may use arbitration, or other alternative means of dispute resolution under the provisions of subchapter IV of chapter 5 of title 5, to settle any tort claim against the United States, to the extent of the agency's authority to award, compromise, or settle such claim without the prior written approval of the Attorney General or his or her designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

28 U.S.C. § 2673 - Reports to Congress

The head of each federal agency shall report annually to Congress all claims paid by it under section 2672 of this title, stating the name of each claimant, the amount claimed, the amount awarded, and a brief description of the claim.

28 U.S.C. § 2674 - Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages. If, however, in any case wherein death was caused, the law of

the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave
rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

28 U.S.C. § 2675 - Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency

in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to
such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of interveningfacts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

28 U.S.C. § 2676 - Judgment as bar

The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

28 U.S.C. § 2677 - Compromise

The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, after the commencement of an action thereon.

28 U.S.C. § 2678 - Attorney fees; penalty

No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346(b) of this title or any settlement made pursuant to section 2677 of this title, or in excess of 20 per centum of any award, compromise, or settlement made pursuant to section 2672 of this title.

Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than $2,000 or imprisoned not more than one year, or both.

28 U.S.C. § 2679 - Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's

estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government-

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding

commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or
employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed

pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if–

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

28 U.S.C. § 2680 - Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to–

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer

of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs
or excise or any other law enforcement officer, if–

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious

prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

28 U.S.C. § 2679(d) (1) of The Federal Employees' Liability Reform and Tort Compensation Act of 1988 (the "*Westfall Act*"), 28 U.S.C. § 2679, states:

Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

28 U.S.C. § 2679(d)(2) of The Federal Employees' Liability Reform and Tort Compensation Act of 1988 (the "*Westfall Act*"), 28 U.S.C. § 2679, states:

Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be .deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

28 C.F.R. § 15.3 Agency report, states:

(a) The Federal employee's employing Federal agency shall submit a report to the United States Attorney for the district embracing the place where the civil action or proceeding is brought fully addressing whether the employee was acting within the scope of his office or employment with the Federal Government at the time of the incident out of which the suit arose, and a copy of the report shall be sent by the employing Federal agency to the responsible Branch Director of the Torts Branch, Civil Division, Department
of Justice.

(b) The appropriate Federal agency shall submit a report to the United States Attorney for the district embracing the place where the civil action or proceeding is brought fully addressing whether the person was acting as a covered person at the time of the incident out of which the suit arose, and a copy of the report shall be sent by the appropriate Federal agency to the responsible Branch Director of the Torts Branch, Civil Division, Department of Justice.

(c) A report under this section shall be submitted at the earliest possible date, or within such time as shall be fixed upon request by the United States Attorney or the responsible Branch Director of the Torts Branch.

Federal Rules of Civil Procedure

Rule 4 (m), states:

Time Limit for Service.
If a defendant is not served within 120 days after the complaint is filed, the court – on motion or on its own after notice to the plaintiff – must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1).

Rule 10. Form of Pleadings

(a) Caption; Names of Parties, states:

Every pleading must have a caption with the court's name, a title, a file number, and a Rule 7(a) designation. The title of the complaint must name all the parties; the title of other pleadings, after naming the first party on each side, may refer generally to other parties.

Rule 12:

(b) How to Present Defenses.

Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:
(1) lack of subject-matter jurisdiction;
(2) lack of personal jurisdiction;
(3) improper venue;
(4) insufficient process;
(5) insufficient service of process;
(6) failure to state a claim upon which relief can be granted; and
(7) failure to join a party under Rule 19.
A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

Rule 15. Amended and Supplemental Pleadings:

(a) Amendments Before Trial.

(1) Amending as a Matter of Course.

A party may amend its pleading once as a matter of course:

(A) before being served with a responsive pleading; or

(B) within 20 days after serving the pleading if a responsive pleading is not allowed and the action is not yet on the trial calendar.

(2) Other Amendments.

In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

(3) Time to Respond.

Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 10 days after service of the amended pleading, whichever is later

(a) By a Claiming Party.

A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim. The motion may be filed at any time after:

(1) 20 days have passed from commencement of the action; or

(2) the opposing party serves a motion for summary judgment.

(b) By a Defending Party.

A party against whom relief is sought may move at any time, with or without supporting affidavits, for summary judgment on all or part of the claim.

(c) Serving the Motion; Proceedings.

The motion must be served at least 10 days before the day set for the hearing. An opposing party may serve opposing affidavits before the hearing day. The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

(d) Case Not Fully Adjudicated on the Motion.

(1) Establishing Facts.

If summary judgment is not rendered on the whole action, the court should, to the extent practicable, determine what material facts are not genuinely at issue. The court should so determine by examining the pleadings and evidence before it and by interrogating the attorneys. It should then issue an order specifying what facts – including items of damages or other relief – are not

genuinely at issue. The facts so specified must be treated as established in the action.

(2) Establishing Liability.

An interlocutory summary judgment may be rendered on liability alone, even if there is a genuine issue on the amount of damages.

(e) Affidavits; Further Testimony.

(1) In General.

A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit. The court may permit an affidavit to be supplemented or opposed by depositions, answers to interrogatories, or additional affidavits.

(2) Opposing Party's Obligation to Respond.

When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must – by affidavits or as otherwise provided in this rule – set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

(f) When Affidavits Are Unavailable.

If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) deny the motion;

(2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or

(3) issue any other just order.

(g) **Affidavits Submitted in Bad Faith.**

If satisfied that an affidavit under this rule is submitted in bad faith or solely for delay, the court must order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt.